ORIGINAL

IN THE

UNITED STATES SUPREME COURT

Supreme Court, U.S.
FILED
MAY 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO: 87-6997 (2)

EUGENE JOHN CARELLA,

Appellant/Defendant

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee/Plaintiff

ON APPEAL FROM ORDER AND JUDGMENT OF

THE SUPERIOR COURT, STATE OF CALIFORNIA,

FOR THE COUNTY OF LOS ANGELES

APPELLATE DEPARTMENT

JURISDICTIONAL STATEMENT

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APPELLANT

30 pp

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QUESTIONS PRESENTED BY APPEAL

I.

California Penal Code Section 484 And Presumptions Contained Therein Are Constitutionally Flawed And Egregiously Violate Appellant's Right To A Jury Trial By Removing As A Matter Of Law The Intent Element From Consideration And Deliberation By The J As Guaranteed By The Fourteenth Amendmer .

In Re Winship, 377 U.S. 358, 90 S.Ct. 1068, 25 L.E. 2d 368 (1970)

II.

California Penal Code Section 484 Is Constitutionally Invalid And Infirmed Because It Transposes The Burden Of Proof From The Prosecution To The Defendant Appellant Herein, And Presumes Defendant's Guilt Of Specious Charges Rather Than His Innocence And Is In Flagrant Violation Of Fundamental Fairness Doctrine Guaranteed by the Fourteenth Amendment Due Process Clause And Impermissibly Relieves State Of Its Constitutional Burden of Persuasion Beyond a Reasonable Doubt Of Every Element Of Alleged Crime.

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.E. 2d 39 (1979)

Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.E. 2d 281 (1977)

Mullaney v. Williams, 421 U.S. 684, 95 S.Ct. 1881, 44 L.E. 2d 508 (1975)

People v. Hedrick, 105 Cal. App. 3d 166, 164 Cal. Rptr 169 (1980)

III.

Penal Code Section 484 Violates Appellant's Due Process Rights Because It Conclusively Presumes Defendant-Appellant's Intention To Commit "Theft" By Fraud If Property Is Not Returned After Demand Without Any Statutory Requirement That Appellant Have Actual Knowledge Of The Demand For Return of Property.

People v. Hedrick, supra.

People v. Hemmer, 96 Cal. Rptr 516 (1971)

IV.

Vehicle Code Section 10851 And 10855 Are Both Violative Of The Defendant's Constitutional Rights To A Trial By Jury Of All The Elements Of A Crime, And Unconstitutionally Shifts The Burden Of Proof From The People To Defendant And Otherwise Usurp A Function Constitutionally Reserved For the Jury In Derogation Of Fourteenth Amendment.

Francis vs. Franklin 105 S.Ct. 1965 , 85 L. Ed. 2d 344 (1985)

V.

Penal Code Section 484(b) And (c) Are Both Constitutionally Invalid Because They Violate Appellant's Right To Have A Jury, As Trier-Of-Fact, Weigh, Consider And Deliberate All Evidence Of Defendant's Intent And Deprives Appellant His Right To A Jury Trial, And Are Otherwise Statutorily Arbitrary And Capricious And Void As A Matter Of Law.

People v. Burres, 161 Cal. Rpt. 593 (1980)

In Re Winship, supra

VI.

Vehicle Code Section 10851, Et Seq., Is Constitutionally Void And Invalid And Unenforceable Because Of Ambiguity And Vagueness In That It Does Not Sufficiently Or Adequately "Apprise" Or "Notice" Defendant With Requisite Specificity As To "Owner" Statutorily Contemplated, Or Place Or Location As to Where Subject Property Is To Be Returned.

Sixth and Fourteenth Amendment
United States Constitution

VII.

Penal Code Section 484 And Vehicle Code Section 10855 Are Both Constitutionally Invalid And Void Because They Diminish And Reduce, As A Matter Of Law, The Burden Of Proof Imposed Upon The Prosecution By The Fourteenth Amendment Due Process Clause.

In Re Winship, 377 U.S. 358, 90 S.Ct. 1068

VIII.

Appellant's Rights Guaranteed By Article 1, Section 9 and 10 The United States Constitution Are Violated By The Penal Code Section 484 And Vehicle Code §10855 Which Seek By Their Statutory Force To Convert A Civil Contractual Relationship Into Evidence Of A Criminal Misconduct, Otherwise Alter, Distort The Kinds And Quantum Of Evidence Necessary To Prove The Existence Of A Crime, And Further Directly Impair And Alter Existing Obligations Of Contract Recognized And In Force.

Article 1, Section 9
Article 1, Section 10
United States Constitution

IX.

Appellant's Right To A Speedy Trial Guaranteed By The Fourteenth Amendment to the United States Constitution Was Consciously Violated By The Trial Judge Because Trial Was Not Commenced Within Forty-Five (45) Days Of His Arraignment On June 27, 1985 And Did Not Commence For Almost Nine (9) Months Later, And Because Trial Judge Refused Appellant's Demand To Dismiss Action With Prejudice Pursuant To Section 1382 Of The California Penal Code Which Compels Mandatory Dismissal, And Where Defendant Did Not Waive Right To A "Speedy Trial" And Where Trial Transcripts Evidence Non-Waiver.

Sixth Amendment
Fourteenth Amendment
U. S. Constitution

X.

Failure To Accord Appellant's Right To A Reporter's Transcript Of Trial Evidence At Public Expense When Appellant Is Financially Indigent, And Where Transcripts Are Essential To Document Gross Constitutional Error And Infirmity (Twenty-Four (24) Claims On Appeal), Combined With Appellate Court's Refusal To Consider Each of The Grounds On Appeal Whose Errors Included Gross Bias, Prejudice And Discrimination By Trial Court Before Jury, And Criminal Prosecutorial Misconduct, Suppression of Evidence, Refusal To Instruct As To Appellant's Defenses Or To Grant Hearing On Jury Charges Violate Due Process Provisions

Of The Fourteenth Amendment Of The United States Constitution As Held By The California Supreme Court.

In Re Armstrong, 126 CA 3d. 565
178 CR 902 (1981)

XI.

Appellant's Right To A Fair Trial And Fair Appeal Were Both Egregiously Abridged By The Trial Judge And Superior Court (Sitting As Appellate Department) Who, Despite Extreme Bias And Discrimination Against Appellant, And Statutory Cause Disqualification Proceeded To Adjudicate Appellant's Trial And Appeal, Notwithstanding Appellant's Vigorous And Incessant Statutory Demands To Have Said Judges Recused And Prohibited From Acting, And Despite The Provisions of C.C.P. Section 170, Et Seq., Which Apply To ALL California Municipal And Superior Court Judges For The County Of Los Angeles.

Sixth and Fourteenth Amendments
United States Constitution

XII.

Trial Judge's Willful Refusal To Grant Appellant Arraignment On Misdemeanor Sentencing, Refusal To Grant Pre-Sentencing Probation Report And Pre-Sentencing Probation Hearing, Even Though Demanded By Appellant Who Has Outstanding

Professional And Academic Background And No Criminal Convictions And Combined With Refusal To Permit Appellant To Reasonable Bail Or Release Him On His Own Recognizance Pending Disposition Of His Immediate Appeal Summate To Violate Appellant's Right To A Fair Trial and Fair Appeal Guaranteed By The Fourteenth Amendment.

In Re Bakke, 42 Cal. 3d 84 (1986)

In Re John Desmond O'Driscoll, L.A. Daily Appellate Report May 21, 1987, 1st App Dist.

(b)

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(d)

REPORTS OF OPINIONS AND DECISIONS BELOW

None of the opinions below has been published in official or non-official reports. The actual text of said decisions appealed from is found in the Appendix of this document.

(e)

GROUNDS FOR JURISDICTION

(i) Nature of Proceeding:

This is an appeal from a criminal misdemeanor prosecution based upon two (2) unconstitutional state statutes pertaining to an alleged unlawful taking and theft af on automobile entrusted to Defendant with express contractual permission, authorization and consent and pursuant to a written civil contract, where all of the contractual provisions were ignored by the rental car company, and resort was made to Section 10851 of the Vehicle Code of the State of California and Section 484 of the Penal Code to enforce "a civil obligation." This appeal is taken upon final judgments rendered by the highest court of the State of California in which a decision could be had, and is based upon the invalidity of two state statutes, i.e., Penal Code Section 484 and Vehicle Code Section 10855 et seq. as being repugnant to the Constitution and laws of the United States and where the state appellate department ruled in favor of their validity 28 U.S.C. Section 1257(2). (See also Rules 10, 11 - United States Supreme Court.)

(ii) Crucial Dates Pertaining To Appeal:

1. Date of Entry of Judgment and Decree Sought to Be Reviewed on Appeal 2/3/88

2. Date of Denial of Petition for Rehearing... 2/24/88 to Be Reviewed on Appeal

3. Date and Notice of Appeal Was Filed in Los Angeles Superior Court for the County of Los Angeles, State of California, Appellate Department 4/11/88

(iii) Statutory Provisions Conferring Jurisdiction On This Court Of Appeal:

28 U.S.C. Section 1257(2)

28 U.S.C. Section 1254

28 U.S.C. Section 2103

(f)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The following constitutional provisions and state statutes are set out verbatim in the Appendix of this document:

California Penal Code Section 484

California Vehicle Code Section 10851 and 10855

Article I, Section 9, 10 the U. S. Constitution

Fourteenth Amendment of the U. S. Constitution

Sixth Amendment of the U. S. Constitution

STATEMENT OF THE CASE

1. Pre-Trial Proceedings.

In the early morning of June 27, 1985, Appellant, Eugene John Carella, an attorney nationally recognized in Who's Who In American Law and Who's Who In California, specializing in federal litigations and appellate work, and, in particular ERISA (Employee Retirement Income Security Act of 1974) litigation, residing in Los Angeles, California, was falsely arrested at his residence in Westwood, California, by Beverly Hills detectives Schwab (a former rental agency car owner) and a Doe detective. At the time of the subject false arrest while Appellant was asleep in his apartment, said detectives threatened Appellant and his fiancee with an automatic weapon which said detectives later placed at Appellant's head stating "they would blow Appellant's brains out if he spoke."

Appellant was falsely arrested for alleged violations of § 10851 of the Vehicle Code and § 484 of the Penal Code with respect to the subject rental vehicle furnished to him pursuant to a written rental contract. A two-count misdemeanor complaint was filed by the District Attorney for the County of Los Angeles and the proceedings denominated as Los Angeles Municipal Court No. M 83675 were commenced on June 27, 1985 against Appellant.

Appellant was brought before John Murphy, who unbenounced to Appellant, was a commissioner of said court, and not a judge. At no point in time from June 27, 1985 up and to the time that

Appellant first learned of the status of said John Murphy as a commissioner on December 2, 1985, and moved for his recusal was Appellant ever apprised by the court of his status, nor did Appellant ever consent to said commissioner, nor did he ever make an intelligent waiver of his right to be arraigned or otherwise have his trial presided over by a judge of the municipal court.

The false criminal charges instigated against Appellant emanated from a written rental automobile contract furnished to Appellant and offered in evidence by the People which defined and controlled the relationship of the parties, including the rental car company, which, in fact, was MPG Car Rental (not the legal owner or registered owner). The charging allegations recited the legal owner of the vehicle to be Ciero and Cierra (Sierra) Car Rental. Appellant was not furnished with a written copy of the subject complaint despite a specific demand by him until on or about December 2, 1985.

On June 27, 1985, Appellant refused to waive his right to a speedy trial and the matter was continued to July 1, 1985 by the then acting commissioner and continued again to August 9, 1985, and again to October 20, 1985. At no point in time did the commissioner or the District Attorney or any other judicial person ever advise Appellant of his specific constitutional rights with respect to a speedy arraignment or speedy trial, nor did they ever advise Appellant of the specific consequences of making any waiver of his rights to a speedy trial or otherwise

secure the statutory consent of Appellant to waive said rights. At no point in time did Appellant waive his right to a speedy trial.

On October 20, 1985, Appellant moved to dismiss the subject false charges relating to the interpretation of a "civil rental contract" on the grounds that he had not been brought to trial timely, had not been accorded a probable cause hearing though in custody at the time of his "arraignment" and that the provisions of § 1382 of the Penal Code were mandatory, not discretionary, and that the commissioner was compulsed to dismiss the false charges at once and to cease and desist in further conduct of the litigation. Appellant further advised the trial court that the proceedings were in total want of probable cause, malicious and vexatious in nature, and carried out for purposes of harming Appellant in his person, property and livelihood.

Appellant renewed his motion again on December 2, 1985 for a mandatory dismissal and also specifically inquired as to whether John Murphy was a judge as indicated on the daily trial calendar posted on his courtroom door, inasmuch as Appellant never consented to the jurisdiction of a commissioner. It was at this point in time that John Murphy first made a disclosure that he was a commissioner (after he had denied Appellant's § 1382 motion to dismiss). Appellant forthwith moved for recusal and the cause was then reassigned by said commissioner to visiting Judge R. Reynolds, sitting in Devision 5.

Upon learning from Appellant that he had not received a written copy of the complaint filed against him, said Judge Reynolds furnished Appellant with a copy of the complaint and further advised him in open court that Ciero Rental Car was listed as the legal owner of the subject rental vehicle as recited in the complaint, notwithstanding that Appellant had rented the subject vehicle from MPG Car Rental, and this disclosure by the court totally surprised and astounded Appellant.

On December 16, 1985, the matter came on in Division 5 again at which time Appellant renewed his motion to dismiss the subject proceedings for failure to accord him a speedy trial and because of the bogus charges and that there was no probable cause or probable cause hearing extended to Appellant despite his demand for same while in custody at the time of his "arraignment." Appellant's motions were denied.

On January 13, 1986, a subsequent visiting judge from Northern California, identified as Judge Morse, presiding over the cause in Division 5 without prior notice to Appellant, threatened, intimidated and sought to silence Appellant in his attempts to have the subject charges dismissed against him pursuant to § 1382 of the Penal Code and to declare a mistrial, inasmuch as no court despite their constitutional requirement to do so, had specifically made a detailed reading of the charges brought against Appellant, or the consequences that would attach in the event that Appellant were to waive any of the constitutional rights accorded him under the state and federal constitution. Appellant's motion was denied and

his request for continuance to seek a writ with the Appellate Department of the Superior Court was also denied. This notwithstanding the absence of any evidence whatsoever that the court had made the proper instructions to Appellant regarding his constitutional rights or the effect of waiving same.

On March 7, 1986, pursuant to written motion set for hearing on that day in Division 2 of the Municipal Court, Appellant moved to dismiss the subject complaint on the grounds that statutes and the statutory presumptions contained in Vehicle Code § 10855 and Penal Code Section 484, et seq., were unconstitutional; that the subject statutes were constitutionally void for vagueness and ambiguity; that the subject criminal prosecution was a prosecution for a "civil debt" involving substantial questions of contractual interpretation and validity properly the subject of civil dispute and contract grievance resolution procedures and impaired the mutuality of obligation provisions of the Constitution; and that the statutory presumptions improperly and unconstitutionally deprived Appellant of having each and every element of the case heard before the jury and intruded upon the jury function, and were arbitrary and capricious, and otherwise unconstitutionally shifted the burden of proof from the prosecution to the defendant. Said motion was denied on March 7, 1986.

2. Trial Proceedings.

On March 17, 1986, the matter came on for jury trial and jury selection. During voir dire Appellant vigorously sought to challenge the juror list and juror pool from whence the jurors were selected. The trial court sitting as Judith O. Stein, who was assigned to the proceedings without prior notice

to Appellant, adamantly abridged and obstructed Appellant's efforts. Appellant's right to ask prospective jurors questions pertinent to the proper and fair discharge of their functions as jurors, including conflicts of interest questions, associations, prior awareness or knowledge by them of Appellant or the subject cause was strenuously foreclosed by the trial court and deprived Appellant of his right to select jurors who would accord him a fair and impartial trial. During the voir dire process on March 17, 1986, said Judith O. Stein exhibited gross and extreme bias and hostility and ill-will toward Appellant of such a magnitude and proportion as to lead a reasonable disinterested third person to conclude that she could not accord Appellant a fair trial and that her actions toward Appellant in view of the jurors had unduly prejudiced and would continue to prejudice Appellant and deprive him of his right to receive a fair and impartial trial by jury.

On March 18, 1986, Appellant forthwith moved for the "immediate disqualification" for cause in writing of said Judith O. Stein on several grounds -- and, in particular, that she had ex parte communications with the District Attorney and other third persons gained outside of the courtroom and had acted in concert with said third parties to grossly harm Appellant and his right to have a fair and impartial trial. The trial judge prevented Appellant from filing the subject disqualification petition and/or lodging said document with the Clerk of the court and Appellant specifically designates said Motion for Disqualification sought to be filed and/or lodged by him. The Disqualification Petition also sought to

have Judge Stein cease and desist from all further conduct in the trial proceedings and to have the disqualification motion heard and adjudicated in accordance with the proper legal procedures for same. In short, the trial court not only prevented Appellant from his timely and efficacious challenge to her and his right to receive a fair trial, but she retaliated by maliciously and malevolently prevent Appellant from speaking or otherwise carrying forward with his defense by placing him in contempt, removing him from the courtroom, and incarcerating him and imposing monetrary fines and penalties without cause and to impede the presentation of his defense. The bias and disparagement by the trial court was done in the presence of the jurors and done to irreparably "taint" Appellant and otherwise prejudicehim in the eyes of the jurors.

On March 18, 1986, Appellant filed his request to charge the jury (jury instructions) and made specific requests upon the trial court to refrain from giving any instructions as to the presumptions contained in 10855 of the Vehicle Code or § 484 of the Vehicle Code, as the instruction by her on these presumptions constituted infirming reversible constitutional error deprived Appellant of his right to have the jury decide all elements of the alleged offenses, and the statutes transposed the burden of proof from the People to Defendant, and otherwise prevented him a fair trial. Appellant also specifically requested an oral hearing on the jury instructions to ensure that the court would not instruct as to the presumptions, as to do so would be per se error, and to otherwise ensure that the court would instruct specifically and affirmatively the jury as to

the requested defenses of Appellant concerning the good faith mistake of fact and good faith belief and Appellant's legal right and title to the subject vehicle conferred pursuant to the terms and provisions of the automobile rental contract and agreement entered into evidence by the prosecution by which the vehicle was furnished to Appellant and other specific intent instructions.

The trial court specifically refused to grant Appellant any hearing, and otherwise refused to give the affirmative instructions referenced above, despite her absolute requirement to do so existing in all prosecutions of this type, and further compounded the harm by then instructing the jurors as to the statutory presumptions contained in the aforereferenced sections over the objection of Appellant.

The People's evidence consisted of three witnesses -- two employees of MPG Car Rental who furnished the jury with conflicting, perjured statements concerning the facts and events relating to the subject transactions and a Detective Schwab of the Beverly Hills Police Department, a former Budget Rental Car franchise owner/agent -- who sought to use the police powers to enforce a "civil contract."

testimony of the People's witnesses, together with their documentary evidence, showed that they had sent a certified letter to Appellant which was never received by him, and they did not produce any evidence whatsoever that Appellant had, in fact, received any written communication or other communication concerning the subject vehicle. Further, all of the People's witnesses testified that despite the fact that they knew

Appellant lived "a little more than one mile from the rental office" where the vehicle was rented in Beverly Hills that not one of them came by to his apartment, left a note, or otherwise sought to personally visit him or to check on the subject vehicle which was parked in Appellant's [open] garage every night. The People's evidence was also deficient in that there were discrepancies in the lack of authentication as to which rental vehicle contract was in effect and otherwise controlled the contractual relationships of the parties and the knowledge of the respective MPG Car Rental people as to the specific amounts of monies that Appellant furnished to the rental car company when he was furnished the subject vehicle. The People's evidence was also conflicting and equivocal as to who as the legal owner of the subject rental vehicle.

Further, all of the People's witnesses testified that none of them ever made a written demand for additional monies owed purportedly pursuant to the contract on Appellant. Further, all of the People's witnesses testified that they had furnished the subject rental vehicle to Appellant with their permission and consent and that at no point in time was that permission and consent revoked with the knowledge of Appellant.

The prosecution represented by Deputy District Attorney Alarcon committed gross and prejudicial prosecutorial misconduct throughout the entire trial proceedings. In addition to derogatory and personal disparagement of Appellant, said district attorney conducted numerous ex parte communication with the trial court in an attempt to fix the juror pool and to prejudice Appellant in light of the jury's eyes. Additionally,

the prosecution commencing with his opening statement put before the jurors written documents, charts and graphs without any evidentiary support, foundation, and without otherwise being corroborated which grossly misrepresented the factual circumstances concerning the transactions -- all to the prejudice and detriment of Appellant and over his continuing objections to strike said documents from being shown to the jurors or permitting the prosecution to refer to said documents as though they were evidence. All of the motions made by Appellant to strike and the concomitant motion for a mistrial for prosecutorial misconduct were also denied by the trial court.

Appellant's motion to dismiss the proceedings at the close of the People's case on the basis of insufficient evidence and on the basis of malicious prosecution, and on the basis that the statutes sued upon by the People were constitutionally invalid, defective, and void for vagueness were all denied by the trial court on or about March 19, 1986.

Appellant's defense was grossly stunted and irreparably prejudiced by the disparaging and prejudicial remarks made by the trial court in front of the jury and the continuing use of threats of contempt, fines and incarceration by the trial court with the express purpose of interfering with Appellant's defense. Appellant produced evidence at the time of trial by direct testimony that he had been physically in Westwood in the Los Angeles area each and every day and night during the subject period in question and had been actively involved as an attorney and/or litigant in numerous legal proceedings located in the Superior Court for the County of Los Angeles.

Central District, and U. S. District Court for the Central District of California during the periods in time in question and material to the defense that Appellant had absolutely no intent to "embezzle or unlawfully take a rental vehicle" which he had received "pursuant to a written contract, vesting permission and authorization in him." In particular, Appellant respectfully demanded that the trial court take judicial notice mandatory pursuant to the Evidence Code of Appellant's attendance on June 17, 1985 at the U. S. District Court, located at 312 No. Spring Street, where he was seeking attorneys fees owed to him under various statutes in the amount at that time of $140,000+; a proceeding where Appellant appeared before a retired judge acting as a referee in a Superior Court litigation on June 20, 1985 at 3255 Wilshire Boulevard in Los Angeles; judicial notice of an EEOC complaint filed at the federal office on or about June 21, 1985, wherein Appellant had brought a discrimination claim where his employer had unjustifiably terminated his contract valued at $100,000+ without cause and in bad faith; an appearance at Santa Monica Municipal Court on June 21, 1985 to satisfy a traffic citation issued on June 6, 1985 -- as well as other proceedings within two (2) weeks of the subject false arrest of Appellant on June 27, 1985. The trial court denied all of the demands of Appellant to take judicial notice or to enable Appellant to file documents of these proceedings, severely injuring and prejudicing his defense and his motion for a new trial.

Appellant also produced evidence by his fiancee that she had actually accompanied him on May 11, 1985 the offices of MPG Car Rental located approximately one mile from Appellant's

residence in Beverly Hills and that she was aware that Appellant had cash monies on him and had actually gone to the offices of MPG Car Rental but said office was closed, or there was no agent on duty, whereupon Appellant secured gas at the Union Station contiguous with the MPG Car Rental located at Doheny and Wilshire and had secured a receipt signed and dated May 11, 1985 which Appellant sought to move into evidence after it was corroborated by his witness as being a true and correct receipt. The trial court suppressed the document from evidence which Appellant specifically sought to introduce at trial and otherwise prevented the witness from testifying as to her knowledge as to the events in question on May 11, 1985 when Appellant was physically at the rental offices of MPG Car Rental in Beverly Hills, (See Appendix)

Appellant also produced evidence from a Jennifer Ayers of the Beverly Hills Police Department that she was, in fact, on duty on or about June 5, 1985 when Appellant called, returning Detective Schwab's call on June 3, 1985, and when she advised Appellant that Detective Schwab was on "an extended vacation" and when Appellant provided said Jennifer Ayers with his telephone number, address so that Detective Schwab could contact him upon his return from vacation.

Appellant produced sufficient evidence vitiating any intent by him to "take or permanently deprive the legal owner" of title to the subject rental vehicle and, in fact, all of the evidence produced by Appellant showed that he was carrying forward with his duties and responsibilities as an attorney in the federal court system, and as an individual who had

numerous litigations pending in the Superior Court for the State of California, Central District. The trial court committed serious reversible error by constantly harassing Appellant's witness who was percipient to the events in question and went well beyond the bounds of permissible and acceptable judicial conduct and threatened and intimidated Appellant's witness in the eyes of the jurors. The trial court's bias, prejudice and hostility was also exemplified by totally outrageous misuse of power in having Appellant's witness improperly and over her objection searched on her person and purse.

The verdict entered by the jury on March 26, 1986 was grossly infirmed and defective because it was secured by fraud and misconduct of the trial court acting in collusion with the District Attorney who irreparably threatened Appellant and his cause in their eyes, and because there is a total failure of evidence to support the verdict. Additionally, the verdict was obtained in violation of Appellant's constitutional rights by the trial court refusing to recuse herself by her refusal to make the instructions requested by Appellant in the Jury Instructions filed by him on March 18, 1986, and because she consciously instructed the jury on the presumptions contained in the Vehicle Code and Penal Code when she was constrained as a matter of law not to do so. (See Appendix).

3. Post Trial And Appellate Proceedings.

Appellant filed a notice of appeal on April 7, 1986 from various orders of trial judge Stein, including the immediate imposition of sentencing and judgment, where the trial judge

foreclosed Appellant any arraignment on sentencing; refused his application for a pre-sentence report, probation report and pre-sentencing probation hearing; refused to stay the sentence and judgment pending his appeal to the Appellate Department, and refused to permit Appellant's release on reasonable bail, and, in essence, "forced" him to serve two (2) months of false incarceration as an object of the aforereferenced conspiracy, through the instrument of the false criminal prosecution now before this Court on appeal. The trial judge, District Attorney, and various CIA/National Security Council hand-appointed jurors consciously and deliberately planned and plotted to irreparably destroy Appellant, a distinguished attorney recognized in Who's Who in American Law and Who's Who in California in his totality by falsely imprisoning him and seeking to disparage and denigrate his legal skills and acumen and to discredit his veracity in furtherance of a massive high-level government conspiracy and coverup against Appellant and to subject him to life-threatening imprisonment and harm.

Since April 7, 1986, Judge Stein, and Los Angeles Superior Court judges sitting as the Appellate Department, as well as their predecessors and other governmental co-conspirators authorized by Administration officials have sought to obscure and obfuscate the aforereferenced criminal misconduct and conspiracy on appellate review by "thwarting Appellant's access to secure the Reporter's Trial Transcripts of Evidence" by falsely arresting him again while attempting to secure said transcripts; by consciously refusing to settle the statement

on appeal in a truthful and legally accurate sufficient manner; by eliminating documents from the Clerk's Record on Appeal -- so as to produce a record on appeal legally insufficient in all respect to enable Appellant to document his grounds for appeal as recited in his Proposed Settled Statement of Evidence. Moreover, the aforesaid judges and various governmental persons have actively conspired with Judges Margolis, Woods, Newman, Robertson to consciously abrogate the Rules of Court and United States Constitution over Appellant's substantial protestation. In short, the conduct of the judges whose action is the subject of this appeal has been calculated to invalidate the appellate process; to obscure meaningful appellate review; to conceal and cover up massive criminal actions and conduct undertaken by them with others against Appellant and to irreparably deny Appellant a fair and meaningful appellate hearing in derogation of Appellant's due process and equal protection rights guaranteed by the United States Constitution and his right to a fair trial.

The judges assigned to hear the appeal, despite having been advised by Appellant of the conscious racketeering conspiracy of the trial court and District Attorney to falsely imprison, harm and carry out false processes against Appellant, and despite being apprised of the fraudulent settled statement certified by the trial judge not comporting with rules and laws of California (Rules 183-189 and People v. Jenkins, and despite having been apprised in Appellant's Motion for Reporter's Transcript at Public Expense on January 28, 1988 (see Appendix) (prior to the hearing of the appeal) of the absolute necessity for said transcripts of evidence, as well

Appellant's financial incapacity to pay for same, have acted and continue to act to frustrate and obstruct the evidence of the criminal misconduct carried out against Appellant prepared by the Court Reporter and used to document his appeal consistent with Appellant's constitutional rights. In Re Armstrong, 126 CA 3d 565 (1981).

Shortly after discovering the identity of the Los Angeles Superior Court judges assigned to the Appellate Department, and immediately upon learning of their denial of his Motion for Reporters Transcripts of Trial Evidence at Public Expense on February 4, 1988, Appellant filed a "Motion for Disqualification of Jack Newman, Alfred Margolis, Frederick Woods, Robert Robertson, judges of Los Angeles Superior Court Appellate Department (see Appendix). Almost concurrently, and only a few days after the aforereferenced judges denied Appellant's Motion for Preparation of Reporters Transcripts of Evidence at Public Expense, said judges entered a memorandum judgment which constitutes a gross fraud and miscarriage of justice affirming the judgment of the trial judge which is the subject of this appeal. (See Appendix).

On February 17, 1988, Appellant filed his formal statutory demand to Clerk of Los Angeles Superior Court Appellate Department advising the Judicial Council to select a judge to adjudicate disqualification, said demand made pursuant to Rule 170.3(c)(5)(6), and also demanded an evidentiary hearing on the motion for disqualification filed on February 5, 1988. (See Appendix). The subject demand was made by Appellant

after Respondents Margolis, Newman, Woods and Robertson answered by affidavit the merits of Appellant's motion and admitted serious allegations contained therein.

The Appellant's motion to disqualify was made pursuant to C.C.P. § 170.3(c), et seq. and specifically so recites in the body of the motion. The disqualification statutes are very clear and precise in that a "judge" for purposes of application of the disqualification statutes, Sections 170 to 170.5, is defined to mean "judges of the justice, municipal and SUPERIOR COURTS ..." It is beyond cavil that Margolis, Woods, Robertson are all judges of the Los Angeles Superior Court, and they themselves admitted they were Los Angeles Superior Court judges. (See Los Angeles Superior Court Judges Listing - Parker Director of California - p. 91, 92) within ambit of disqualification statute and susceptible to disqualification challenges.

Appellant in his statutory demand of February 17, 1988 formally demanded that said judges Newman, Margolis, Robertson and Woods cease at once from all further conduct and action in the subject appeal consistent with the provisions of § 170.3(c)(1)(5) which proscribes the judges from passing upon his or her own disqualification or upon the sufficiency in law, fact or otherwise of the Statement of Disqualification filed by Appellant herein.

On February 18, 1988, Appellant filed his timely petition for rehearing and application for transfer and produced substantial new evidence in the form of declaration showing

that the February 3, 1988 appellate order was a fraud on its face. A true copy of said Petition for Rehearing is attached. (See Appendix). Also in the petition for rehearing, Appellant reaffirmed his disqualification to Judges Margolis, Newman, Woods and Robertson from acting on his appeal in any capacity whatsoever.

On February 26, 1988 Appellant sought to confirm the transmittal of his demand to the Judicial Council filed by him on February 17, 1988 and was advised by the Clerk of the Los Angeles Superior Court Hardey that he willfully refused and continued to refuse to transmit the disqualification motion and Appellant's demand that the Judicial Council act to appoint a judge to adjudicate Petitioner's motion for disqualification of Judges Margolis, Woods, Newman and Robertson.

On February 26, 1988, Appellant learned for the first time that Judges Margolis, Woodr, Robertson and Newman, despite the prohibitions of Section 170.4(d) stating a "judge shall have no power to act in any proceeding after his or her disqualification, OR after the filing of a statement of disqualification until the question of his or her disqualification has been determined," proceeded to enter a fraudulent order on February 24, 1988 (nineteen (19) days after Appellant filed his Motion for Disqualification, denying Appellant's Petition for Rehearing, stay of remittitur, and other relief. (See Appendix). The action of these judges constitute a nullity and is evidence of a conscious misuse of process carried out against Appellant, and when combined with the unconstitutional state statute referenced herein, requi e

the judgment be vacated at once by this Court on appeal.

(h)

STATEMENT OF IMPORTANCE OF QUESTIONS PRESENTED

The questions and issues presented by the subject appeal demonstrate gross constitutional infirmities with the criminal statutes by which Appellant has been falsely prosecuted, falsely convicted, and falsely imprisoned. Further, the statutory presumptions subsumed in each of the aforereferenced statutes, whose invalidity is the subject of this appeal, are also blatantly unconstitutional on their face and are grossly invalid in light of the United States Supreme Court holdings found and contained in the following mandates: In Re Winship, 377 U.S. 358, 90 S.Ct. 1068, 25 L.E. 2d 368 (1970); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.E. 2d 39 (1979); Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.E. 2d 281 (1977); and Mullaney v. Williams, 421 U.S. 684, 95 S.Ct. 1881, 44 L.E. 2d 508 (1975); Francis v. Franklin, 105 S.Ct. 1965, 85 L.E. 2d 344 (1985).

This Court's jurisdiction has been properly invoked pursuant to 28 U.S.C. § 1257(2) and it is vital and imperative that the Court exercise its jurisdiction to strike down both of these statutes which constitute gross constitutional violations of Appellant's rights. Accordingly, The Court must act to throw out the judgement at once.

BY: EUGENE J. CARELLA, ESQ.

IN THE

UNITED STATES SUPREME COURT

NO. 87-6997

EUGENE JOHN CAMELLA,

Appellant/Defendant

VS.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee/Plaintiff

ON APPEAL FROM ORDER AND JUDGMENT OF

THE SUPERIOR COURT, STATE OF CALIFORNIA,

FOR THE COUNTY OF LOS ANGELES

APPELLATE DEPARTMENT

APPENDIX

EUGENE J. CAMELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

APPELLANT

APPENDICES INDEX

Document	Appendix Letter
Memorandum Judgment of Los Angeles Superior Court Appellate Department (Subject of Appeal) Filed: February 3, 1988	A
Order of Los Angeles Superior Court Appellate Department Denying Appellant's Petition For Rehearing (Subject of Appeal) Filed: February 24, 1988	B
Order of Los Angeles Superior Court Appellate Department Denying Appellant's Motion and Demand For Reporters Transcript At Public Expense (Subject of Appeal) Filed: January 26, 1988	C
Order of Supreme Court of state of California Denying Appellant's Petition for Review Filed: May 23, 1988	D
Notice of Appeal in Los Angeles Superior Court Served On This Court Filed: April 11, 1988	E
Statutes and Constitutional Issues Involved In Appeal	F
Appellant's Request to Charge Jury (Jury Instructions) In Los Angeles Municipal Court, Beverly Hills Judicial District Filed: March 17, 1986	G
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Appellant's Motion for Disqualification of Jack Newman, Alfred Margolis, Frederick Woods, Robert Robertson, Judges of Los Angeles Superior Court Appellate Department Filed: February 3, 1988	I
Appellant's Petition for Rehearing and Application for Transfer and Supporting Declarations Filed: February 17, 1988	J

Document	Appendix Letter
Appellant's Statutory Demand to Clerk of Los Angeles Superior Court Appellate Department Advising Judicial Council to Select Judge to Adjudicate Disqualification: Filed: February 17, 1988	F

"A"

FILED

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. EUGENE JOHN CAPELLA, Defendant and Appellant.	Superior Ct. No.CRA24011 Municipal Court of the Beverly Hills Judicial District No. M83675 MEMORANDUM JUDGMENT

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is affirmed.

Defendant contends that the trial court erred in instructing the jury concerning the presumptions contained in Penal Code section 484 subdivision (b) and Vehicle Code section 10855. We do not agree. Both presumptions are presumptions affecting the burden of producing evidence. (See People v. Benner (1971) 19 Cal.App.3d 1052, 1060-1062.) The effect of such presumptions, under Evidence Code section 604, is to require the trier of fact to assume the existence of the

presumed fact unless and until evidence is introduced which would support finding of its nonexi. ce. (See People v. Hedrick (1980) 105 Cal.App.3d 166, 170.) Here, un ike the defendants in Hemmer and Hedrick, defendant never offered testimony concerning the nonexistence of the presumed facts stated in Penal Code section 484 subdivision (b) and Vehicle Code section 10855. We find no error.

Defendant next contends that the trial court erred by not giving an instruction concerning a good faith belief or mistake of law or fact. However, defendant offered no evidence to support the giving of such instructions. Again, there was no error. (People v. Vineberg (1981) 125 Cal.App.3d 127, 138.)

Next, the court docket directly contradicts defendant's contention that he did not waive time on July 1, 1985. Thus, the record shows there was no violation of defendant's speedy trial rights.

Defendant contends that the court was required to stay judgment and sentencing pending defendant's appeal. The record, however, shows that the trial court set bail for defendant pending his appeal. Such was all that was required (Pen. Code, § 1272(2).)

Defendant next claims that the trial court erred by not obtaining a pre-sentencing probation report before sentencing defendant. The trial court had no mandatory duty t do so. (Pen. Code, § 1203(d).)

Our review of the record convinces us that substantial evidence supports defendant's conviction. (People v. Johnson (1980) 26 Cal.3d 557, 562.)

76T176T- PS 12 84

We need not address defendant's remaining contention. (Cal. Rules of Court, rule 105(c); see People v. Merriam (1967) 66 Cal.2d 390, 397.) We observe, however, in our review, no evidence to support appellant's contention.

Presiding Judge

We concur.

Judge

Judge

B

FILED

FEB 24 1955

FRANK A. [illegible] County Clerk

Alan Hardey

BY ALAN HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,	Superior Ct. No.CR A24001
Plaintiff and Respondent,	Municipal Court of the
vs.	Beverly Hills Judicial District
EUGENE JOHN CARELLA,	No. M 83675
Defendant and Appellant.	ORDER DENYING DEFENDANT'S PETITION FOR REHEARING AND APPLICATION FOR TRANSFER

THE COURT*

The above petition and application having been made, submitted and duly considered,

Said petition and application are denied.

IT IS FURTHER ORDERED that all other demands included in the above petition and application are denied.

Margolis, Roberson, Woods

*Before Margolis, P.J., Roberson, J., and Woods, J.

vm10

"C"

FILED

JAN 20 1988

Alan Harding

BY ALAN HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs EUGENE JOHN CARELLA, Defendant and Appellant.	Superior Court No. CR A 24001 Municipal Court of the Beverly Hills Judicial Dist. No. M 83675

ORDER

THE COURT*

Appellant's Motion and Demand for Reporters Transcripts at Public Expense, filed January 26, 1988, having been read and fully considered.

IT IS ORDERED that said motion and demand is hereby denied.

Margolis Woods

* Before Margolis, P. J. and Woods, J.

EXHIBIT "II"

"D"

No. S72 8033097 - SB04885

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
MAR 2 3 1988
Lawrence P. Gill, Clerk
DEPUTY

EUGENE JOHN CARELLA, Petitioner

v.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, Respondent;
PEOPLE, Real Party in Interest

Lucas, C.J. did not participate.

Application for stay and petition for review DENIED.

Eagleson
Acting Chief Justice

CERTIFICATE OF SERVICE

I, Eugene J. Carella, the undersigned, do hereby certify that on this 16 day of May 1988, I served a true and correct copy of the foregoing Motion For Leave To Proceed In Forma Pauperis And Affidavit In Support Thereof and Jurisdictional Statement and Appendix on all parties of record and interested persons by first class mail, postage-prepaid, as follows:

Ira Reiner
District Attorney
849 S. Broadway
11th Floor
Los Angeles, CA 90012

John Van de Kamp
Attorney General
State of California
6000 State Building
350 McAllister Street
San Francisco, CA 94102

Judith Stein, Judge
Los Angeles Municipal Court
Beverly Hills Judicial District
9355 Burton Way
Beverly Hills, CA 90210

Fred Woods, Jack Newman,
Alfred Margolis, Robert
Robertson, Judges
Los Angeles Superior Court
Appellate Department
111 N. Hill St., Room 607
Los Angeles, CA 90017

Eugene J. Carella

IN THE SUPERIOR COURT, STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

APPELLATE DEPARTMENT

ORIGINAL FILED
APR 1 1 1988

EUGENE JOHN CARELLA, Appellant/Defendant, vs. PEOPLE OF THE STATE OF CALIFORNIA, Appellee/Plaintiff	Superior Court No. CRA 24001 Municipal Court, Beverly Hills Judicial District No. M 83675 NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, pursuant to Rule 10 of the Rules of the United States Supreme Court, that EUGENE JOHN CARELLA, appellant herein, defendant below, appeals the judgment and Order entered February 3, 1988, by the Los Angeles Superior Court Appellate Department affirming the trial court's judgment, and that Order and judgment entered February 24, 1988 denying Appellant's Petition for Rehearing and Application for Certification and Other Relief, to the Supreme Court of the United States.

Said Appeal is specifically based upon the constitutional invalidity of California Vehicle Code Statutes 10851 and 10855 and Penal Code Statute 484, et seq., and that each of said statutes is grossly repugnant to and violative of the Constitution

E

and laws of the United States, and for such additional meritorious grounds as more fully appear in the Record herein.

Said Appeal is statutorily authorized and mandated by 28 U.S.C. Section 1257(2) and otherwise timely brought within the time requirements of Rule 11 of the United States Supreme Court which accords Appellant ninety (90) days from February 24, 1988 to file said Notice of Appeal. Appellant further requests the Clerk of the Court, having possession of the Record, to forthwith certify it and provide for its transmission to the Clerk of the United States Supreme Court in accordance with Rule 13 of the United States Supreme Court.

Dated: April 5, 1988

BY: _____
EUGENE JOHN CAMILLA
Appellant

P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

CERTIFICATE OF SERVICE

I, Eugene J. Carella, the undersigned, hereby certify and swear that on this____day of April 1988 I served a true and correct copy of the within NOTICE OF APPEAL on all parties of record, interested persons, and Clerk of the Los Angeles Municipal Court, Beverly Hills Judicial District, and Clerk of the Los Angeles Superior Court Appellate Department, by first class mail, postage-prepaid, addressed as follows:

Ira Reiner
District Attorney
849 S. Broadway
11th Floor
Los Angeles, CA 90012

John Van de Kamp
Attorney General
State of California
6000 State Building
350 McAllister Street
San Francisco, CA 94102

Clerk
Los Angeles Superior Court
Appellate Department
111 N. Hill Street
Room 607
Los Angeles, CA 90012

Judith Stein, Judge
Los Angeles Municipal Court
Beverly Hills Judicial District
9355 Burton Way
Beverly Hills, CA 90210

Fred Woods, Jack Newman,
Alfred Margolis, Robert
Robertson, Judges
Los Angeles Superior Court
Appellate Department
111 N. Hill St., Room 607
Los Angeles, CA 90017

Paul Woods
Air Bail Bonds
121 E. Regent St.
Inglewood, CA 90301

Clerk
Los Angeles Municipal Court
Beverly Hills Judicial District
9355 Burton Way
Beverly Hills, CA 90210

Clerk, Supreme Court of the UnitedStates
U. S. Supreme Court Building
Washington, D. C. 20543

Eugene J. Carella

Vehicle Code § 10851. Theft and Unlawful Driving or Taking Of A Vehicle.

(a) Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily to deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in the county jail for not more than one year or in the state prison or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment.

(b) If the vehicle is (1) an ambulance, as defined in subdivision (a) of Section 165, (2) a distinctively marked vehicle of a law enforcement agency or fire department, taken while the ambulance or vehicle is on an emergency call, and this fact is known to the person driving or taking, or any person who is party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, or (3) a vehicle which has been modified for the use of a disabled veteran or any other disabled person and which displays a distinguishing license plate or placard issued pursuant to Section 22511.5 of 22511.9 and this fact is known or should reasonably have been known to the person driving or taking, or any person who is party or an accessory in the driving or unauthorized taking or stealing, the offense is a felony punishable by imprisonment

"F"

in the state prison for two, three, or four years or by a fine of not more than ten thousand dollars ($10,000), or by both the fine and imprisonment.

(c) In any prosecution for a violation of subdivision (a) or (b), the consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of the owner's consent on a previous occasion to the taking or driving of the vehicle by the same or a different person.

(d) The existence of any fact which makes subdivision (b) applicable shall be alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

Vehicle Code § 10855. Leased and Rented Vehicles.

Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

Penal Code § 484. Theft Defined.

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud

any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

(b) Except as provided in Section 10855 of the Vehicle Code, intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for retur: of the property so leased or rented * * *.

(c) Notwithstanding the provisions of subdivision (b), if one presents with criminal intent identification which bears a false or fictitious name or address for the purpose of obtaining the lease or rental of the personal property of another, the presumption created herein shall apply upon the failure of the lessee to return the rental property at the expiration of the lease or rental agreement, and no written demand for the return of the lease or rented property shall be required.

(d) The presumptions created by * * * subdivision (b) and (c) are presumptions affecting the burden of producing evidence.

(e) Within 30 days after the lease or rental agreement has expired, the owner shall make written demand for return of the property so leased or rented. Notice addressed and mailed to the lessee or renter at the address given at the time of the making of the lease or rental agreement and to any other known address shall constitute proper demand. Where the owner fails to make such written demand the presumption created by subdivision (b) shall not apply.

Article 1, Section 9, cl 3 (Powers Denied Congress).

No Bill of Attainder or ex post facto law shall be passed.

Article 1, Section 10, cl. 1 [Powers Denied the States].

No state shall enter into any treaty, alliance, or confederation, grant letters of marque or reprisal, coin money, omit bills of credit, make anything but gold or silver coin, a tender in payment of debts, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

Amendment VI [Rights of the Accused].

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime alleged shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor and to have assistance of counsel for his defense.

Amendment XIV.

Section 1: Citizens of the United States.

All persons born and naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor to deny any person under its jurisdiction equal protection of the laws.

"G"

EUGENE JOHN CARELLA
P. O. Box 67292
Century City
Los Angeles, California 90067

Defendant

IN THE MUNICIPAL COURT OF THE BEVERLY HILLS JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

EUGENE JOHN CARELLA,

Defendant.

NO: M 83675

REQUEST TO CHARGE JURY

Date: March 18, 1986
Place: Division 5
Time: 9:30 A.M.

COMES NOW Defendant, EUGENE JOHN CARELLA, and does respectfully request that the Court make the following jury charges in the deliberation of this cause.

I.

REMINDER OF VOIR DIRE OBLIGATIONS

In determining the facts, you are reminded that before each member of the jury was accepted and sworn to act as a juror, he was asked questions regarding his qualifications, fairness, and freedom from prejudice or bias . The purpose of those questions was to obtain a fair and impartial jury. On the basis of the answers given, each of you was accepted

EXHIBIT "G"

by the parties to this action. Those answers are as binding on each of you now as they were then, and should remain so until you are discharged from consideration of this case.

II.

GOOD FAITH BELIEF IN RIGHT OR CLAIM TO PROPERTY

Evidence has been introduced which tends to show that the defendant had a good faith belief that the vehicle which he allegedly took was contractually furnished him with consent and permission of owner.

A good faith belief, even though mistakenly held, that one has a right or claim to the vehicle allegedly taken negates an intent to embezzle or unlawfully take the property.

If, after a consideration of all the evidence you have a reasonable doubt as to whether the defendant, because of such belief, intended to take the property of another, you must find him not guilty.

III.

MISTAKE OF FACT

An act committed or an omission made under ignorance or mistake of fact which disproves any criminal intent is not a crime.

Thus a person is not guilty of a crime if he commits an act or fails to act under an honest belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful.

Belief in these facts and circumstances is a complete defense to the charge even if the belief is unreasonable. Before you may convict the defendant of the charge against him, you must be convinced beyond a reasonable doubt that the defendant did not honestly so believe.

IV.

MISTAKE OF LAW

The crime charged against the defendant requires that the prosecution prove beyond a reasonable doubt that at the time of its commission the defendant had the specific intent to willfully and unlawfully take and unlawfully drive the subject vehicle with an intent to deprive the owner of title and possession of said vehicle.

It is a valid defense to this charge that the defendant did not have this specific intent because of a good faith belief that the law allowed him to act as he did at all relevant times.

A good faith belief is one which is honestly held, regardless of the reasonableness of the belief.

V.

SPECIFIC INTENT

The defendant is charged with a crime which requires that a specific intent to commit such crime be established beyond a reasonable doubt before the crime or degree of the crime is proven.

If from all the evidence you have a reasonable doubt whether defendant was capable of forming this specific intent, you must give the defendant the benefit of that doubt and find that he did not have this specific intent in mind.

CONCLUSION

WHEREFORE, Defendant respectfully prays the Court charge the jury in conformity herewith and further requests leave to make further and additional jury charges in accordance with law.

DATED: March 17, 1986

BY: [redacted]
EUGENE JOHN CAPELLA

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this the 18 day of March 1986 I served a true copy of the foregoing REQUEST TO CHARGE JURY on all parties of record by personal service in Beverly Hills, California, on the following:

Deputy District Attorney
BEVERLY HILLS MUNICIPAL COURTHOUSE
Burton Way
Beverly Hills, California

EUGENE JOHN CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, California 90067-0292

Appellant

ORIGINAL FILED
JAN 2 6 1988
COUNTY CLERK

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

EUGENE JOHN CARELLA, Appellant, vs. PEOPLE OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. CRA 24001 LAMC M 83675 APPELLANT'S MOTION AND DEMAND FOR REPORTERS TRANSCRIPTS AT PUBLIC EXPENSE; DECLARATION OF EUGENE J. CARELLA; MEMORANDUM OF POINTS AND AUTHORITIES For Immediate Action

TO: JUDGES OF APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, CENTRAL DISTRICT

COMES NOW, EUGENE JOHN CARELLA, ESQ., Appellant herein, without waiver of disqualification to the Judges of the Appellate Department of the Superior Court of California, County of Los Angeles, Central District, and pursuant to the Rules of Court and the Supreme Court mandate of In Re Armstrong, 126 CA 3d 565, 178 CR 902 (1981), and moves this Court for an Order directing that the entire Transcripts of Proceedings in the false and criminally-inspired

EXHIBIT "H"

and orchestrated trial proceedings, the subject of this appeal, be prepared and provided to Appellant at public expense and concurrently filed with the Appellate Department of the Superior Court to be used in the adjudication of Appellant's appeal now pending before this Court.

In support of the subject motion, Appellant shows the Court the imperative and indisputable need to have verbatim reporters' transcripts to document the gross criminal irregularities carried out against Appellant and the necessity to document a total failure and insufficiency of evidence by the People and reprehensible and gross prosecutorial and trial court prejudice, misconduct and fraud used to secure the false judgment and verdict now before this Court.

Appellant, in addition to making a prima facie showing for the need for said reporters' transcripts, also shows his Affidavit of Present Financial Indigency identified as EXHIBIT "A-3" and attached herewith and incorporated and made a part of his Declaration (EXHIBIT "A) documenting his incapacity to pay for said transcripts. That failure to accord Appellant a reporter's transcript and made a part of the Record on Appeal will result in irreparable injury to Appellant in the disposition of his appeal not yet submitted to this Court, and will grossly abridge his constitutional right to due process of law, as the certified "settled statement" prepared

by the trial court is a fraudulent, misrepresentation of the proceedings and evidence adduced at trial; that the purpose and objective of this appellate court will also be served by the preparation and filing of the Reporters' Transcripts, as said transcripts set forth "fairly and accurately" the evidence and proceedings below and fully demonstrate a total abrogation of this Appellant's constitutional rights at time of trial, as is more completely demonstrated in the grounds for appeal.

Said motion is based upon all papers, pleadings, documents, and the like on file herein--together with the Declaration of Appellant, identified as Exhibit "A" and the Memorandum of Points and Authorities attached herewith.

DATED: January 22, 1988

BY: _____
EUGENE JOHN CARELLA

EXHIBIT A

DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE J. CARELLA, declare and state as follows:

1. That I am the Appellant herein-defendant below.

2. That I am herewith and hereby specifically demanding that the Reporters' Transcript of Trial Proceedings, the subject of this appeal, be furnished to me and made a part of the Record on Appeal and filed with this Court forthwith.

3. That a true and correct copy of a Proposed Statement on Appeal and Notice to Prepare and Incorporate Reporters' Transcripts in Statement which was filed with the trial court on or about June 14, 1986 is identified as EXHIBIT "A-1" and attached herewith, consisting of nine (9) pages.

4. That these grounds for appeal have been certified by the trial court in the Statement on Appeal.

5. That a review of said Grounds for Appeal demonstrates twenty-four (24) separate grounds for appeal, several of which assert gross prosecutorial and trial court misconduct, fraud and prejudice which can only be evidenced by verbatim reporters' transcripts. (Grounds Nos. 7, 14, 15, 17, 18 and 22).

EXHIBIT "A"

6. That Appellant further urges this Court to throw out the bogus and false judgment and conviction of the trial court on the grounds of a "complete insufficiency of evidence" and failure of proof by the People (Ground No. 10, 18, 21) and that the trial court failed to allow and admit important evidence to support Appellant's defense (Ground No. 20); and committed gross irregularities and errors of constitutional proportion regarding the giving of prejudicial jury instruction (Ground No. 6); and refused to make other mandatory jury instructions required by her as a matter of law to protect Appellant's constitutional rights to a fair trial (Ground No. 5).

7. That the "settled statement" certified by the trial judge is gross and material misrepresentation of the evidence and proceedings occurring in the trial court, and is also lacking its requirement to set forth "concise factual summaries of each of the proceedings before the court from arraignment to judgment, including a recitation of the manner in which each of defendant's constitutional rights were protected." See, People v. Jenkins, 55 CA 3d, Supp. 55, 127, CR. 870 (1976).

8. That I have been the victim of a common enterprise of criminal racketeering utilizing various state and federal courts throughout the United States to deprive me of my attorney fees, costs, and contingency fees earned by and owed to me, and to destroy my livelihood, person, and

federal practice and reputation.

9. That the subject prosecution, the subject of this appeal, is but "one component" of this invidious criminal racketeering conspiracy orchestrated by state and federal officials.

10. That I am a distinguished legal advocate and recognized as such in Who's Who in American Law because of my contributions to the legal profession and that I was arguing a case in the United States District Court for the Central District of California on June 18, 1985 -- one (1) week before the false arrest.

11. That on or about January 20, 1988, a few days ago, I received word from the United States Supreme Court that my attempts to have the United States Court of Appeals for the Ninth Circuit act to grant me attorneys fees in this matter earned and owed to me and represented to be paid to me (now exceeding $200,000) was rejected. (A copy of said Supreme Court Order is identified as EXHIBIT "A-2" and attached herewith.

12. That I had fully intended to receive these monies, inasmuch as the District Court for the Central District of California authorized an "attorney lien" to protect my quantum meruit legal services in a successful ERISA (Employee Retirement Income Act of 1974) litigation

I conducted against General Electric Company, Inc., et al. on behalf of an asbestosis-affected pension plan beneficiary who had been cheated out of all his disability and retirement benefits, but now enjoys a substantial settlement on account of my legal efforts and time expended on his behalf.

13. That I have expended well in excess of $200,000.00 of monies (pro bono out-of-pocket monies) and in excess of $1 million of billable time on behalf of said client's seeking redress in the federal court system.

14. That in view of the Supreme Court's denial on January 11, 1987 directing that my fees be paid to me, I am now at this time financially incapacitated and indigent, having exhausted all of my resources on behalf of client causes.

15. That the enclosed "Declaration of Financial Condition" in support of my demand for a Reporter's Transcript at public expense is a true and correct statement of my financial condition at this time and I am unable to pay for the Reporters' Transcripts which I have been advised by the Court Reporter would be between $5,000-6,000.

16. That the Reporters' Transcripts of Proceedings are material and essential to adjudicate my appeal and will greatly assist the Court in its appellate decision-making and ensure the interest of justice.

17. That I further state that the subject trial proceedings before this Court were in furtherance of a criminal racketeering conspiracy authorized by the highest members of the Reagan Administration and done with the knowledge, consent and approval and affirmation of Ronald Reagan personally, together with other high-ranking members of the Administration and carried out against me--including, but not limited to, Edwin Meese, William French Smith and William Webster.

18. That it is impossible for me to have a fair appeal, hearing or fair adjudication or fair trial without the preparation of the Reporters' Transcripts at public expense and I have made a prima facie showing for their need before this appeal is submitted to the Court for adjudication.

19. That the prospect for my financial condition to improve in the next six to twelve months is extremely marginal, as the conspiracy to deprive me of all my legal fees and earnings and bar practice has been further amplified and exacerbated by the subject malicious false proceedings.

20. That there is no plausible reason the People can advance to deny the motion, inasmuch as I have alleged a/"misuse of trial court proceedings" which Ira Reiner has a duty to investigate, and said trial transcripts demonstrate criminality in the conduct of the proceedings against me.

21. That I further specifically request that the Court direct Robert Morse, Court Reporter, to forthwith prepare the transcripts of trial proceedings set forth in Pages 8, 9 of EXHIBIT "A-1" attached herewith.

22. That I further request that oral argument on the appeal scheduled for January 28, 1988 be continued for a period of sixty (60) days to allow the Court to receive and review the transcripts referenced herein.

I declare that the foregoing is true and correct to the best of my knowledge and ability.

Executed on this 25 day of January 1988 in Los Angeles, California.

EUGENE JOHN CARELLA, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

Appellant, EUGENE J. CARELLA, ESQ., has alleged that the trial court proceedings and judgment of misdemeanor conviction for alleged "theft" of a rental automobile furnished to him pursuant to a written rental contract was in furtherance of a racketeering conspiracy designed to destroy Appellant's federal legal practice, to cheat him of legal fees and monies owed to him, to destroy his lawyering credentials, and to cover up high-level Administration criminal misconduct against him.

The Appellant has recited over twenty-four (24) grounds for appeal, requiring that the misdemeanor judgment and conviction be "thrown out the window" and vacated as a matter of law forthwith. The "settled statement" certified by the trial judge -- whose disqualification is one of the grounds for appeal -- is a rank fraud and grossly fails to state the evidence "fairly and truthfully" and is otherwise an inferior, ill-drafted and self-serving document not in conformity with the Rules of Court, Rule 183, et seq., or mandates governing the requirements of the settled statement. See, People v. Jenkins, supra. Furthermore, Appellant has now advised this Court that within the last two weeks he has learned that the Supreme Court has refused to act to overturn Judge Anthony Kennedy's Order cheating Appellant Attorney Carella of attorney

fees owed to him exceeding $200,000 as a result of his successful legal representation of a client against General Electric Company, Inc. for asbestosis disability. (Note Appellant was in the U. S. District Court at 312 N. Spring Street on June 18, 1985 -- one week before the subject false arrest for taking "a rental car," seeking to collect these very same legal fees.) Appellant has stated twenty-four (24) founds for appeal which demonstrate insufficient evidence, prosecutorial misconduct, fraud and conspiracy in jury selection, and gross misconduct in trial court's giving of "prejudicial jury instructions" and her refusal to make others. The grounds for appeal can only be adjudicated on the basis of verbatim reporters' transcripts. Appellant has made an overwhelming showing of the need for a verbatim reporters' transcript, and there is no way the People can overcome said showing or deny Appellant a verbatim reporters' transcripts without further violating Appellant's constitutional and civil rights and having this Court act to throw out the false conviction. See, March v. Municipal Court, 7 C.3d 422, 102 CR 597 (1972); Mayer v. Chicago, 404 U.S. 189 (1971); People v. Hosner, 15 C.3d 60, 64, 123 CR 381, 384 (1975).

Further, Appellant's current financial status as an indigent determines and activates his right to receive a transcript prepared at public expense, automatically. Moreover, since Appellant has recited twenty-four (24) grounds for appeal of enormous breadth and scope, anything other than a complete reporters' transcript would be inadequate, under March,

supra, and any doubt that a complete transcript should be ordered and prepared, should be resolved in Appellant's favor.

The law in this State is crystal clear. Appellants, such as appellant herein, who are indigent must be provided a verbatim record and reporters' transcripts of proceedings for [illegible] documentation and adjudication of his appeal upon request or demand, where he seeks to appeal a misdemeanor conviction. This has been the law in California since 1982 up and to the present date. In Re Armstrong, 126 CA 3d 565, 178 CR 902.

The grounds for appeal recited by Appellant in his Proposed Statement on Appeal certified by the trial court make a reporter's transcript absolutely imperative to ensuring Appellant's due process and equal protection guaranteed by the Fourteenth Amendment of the U. S. Constitution and the Constitution of this State.

CONCLUSION

FOR ALL THE REASONS advanced herein, Appellant respectfully prays his motion for Reporters' Transcripts at public expense be granted forthwith, and that the oral argument in the aforereferenced appeal be continued for at least sixty (60) days to allow Robert Morse, Court Reporter, to prepare the actual reporters' transcripts.

Let an Order issue that Robert Morse prepare a

reporters transcript of the proceedings identified in Appellant's Notice to Prepare Transcripts filed June 14, 1986 (Pages 8, 9 of Exhibit "A-1" attached) and that said expense be borne by the State of California and that the oral argument scheduled in the subject appeal be continued for a period of sixty (60) days from January 28, 1988 to March 29, 1988; and for such further and additional relief the Court deems necessary and proper.

DATED: January 25, 1988

BY: _____
EUGENE JOHN CARELLA, ESQ.
Appellant

EUGENE JOHN CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

Appellant/Defendant

IN THE MUNICIPAL COURT OF BEVERLY HILLS JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Respondent/Plaintiff vs. EUGENE JOHN CARELLA, Appellant/Defendant.	APPEAL NO. CRA 24001 LAMC No. M 83675 APPELLANT'S PROPOSED STATEMENT ON APPEAL AND NOTICE TO PREPARE AND INCORPORATE REPORTERS TRANSCRIPT IN STATEMENT.

COMES NOW EUGENE JOHN CARELLA, ESQ., pursuant to the Rules of Court, and does respectfully submit his within Proposed Statement on Appeal, together with his Notice to Prepare and Incorporate Reporters Transcript and Grounds for Appeal, more fully identified as EXHIBIT "A" attached herewith, and specifically prays that the Presiding Judge or Acting Presiding Judge forthwith certify said proposed statement and take such further action necessary to insure the interest of justice in light of Appellant's continuing challenge and disqualification of the trial judge Judith O. Stein because of her gross bias, prejudice, ill will and hatred demonstrated against Appellant and in favor of the Peop

EXHIBIT "A-1"

Appellant also prays such further and additional relief necessary and proper in light of the circumstances presented herein, and to further supplement the subject proposed statement.

DATED: June 14, 1986

BY: _____
EUGENE JOHN CARELLA, ESQ.
Appellant

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PROPOSED STATEMENT

Appellant specifically incorporates all those grounds for appeal hereinafter set forth, identified as Grounds 1 thru 23, and further specifically incorporates all those reporters transcripts of proceedings in accordance with his notice to prepare reporters transcript made a part hereof, and such further additions in accordance with law.

GROUNDS ON APPEAL

1. Appellant's right to a speedy trial guaranteed by state and federal constitutions was grossly abridged by the Court's denial of Appellant's Motion for Mandatory Dismissal pursuant to Section 1382 of the Penal Code, and said denial constitutes reversible error.

2. The trial court's failure to stand recused and disqualified in accordance with Appellant's Disqualification Petition and its failure to permit Petition to be filed or lodged constitutes reversible error.

3. Trial court's extreme and gross bias and hatred against Appellant and in favor of The People--including threats of oppression, incarceration and punitive fines--deprived Appellant his right to receive a fair trial and other constitutional rights.

4. Court's refusal to dismiss the Complaint and declare the statutory presumptions contained in Sec. 10855 of Vehicle Code and 484 of the Penal Code unconstitutional constitutes an abuse of discretion

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and reversible error.

5. Trial court's refusal and failure to instruct the jury in accordance with Appellant's Written Jury Instructions and Charges filed by Appellant on March 18, 1986 and its failure to make any sua sponte instructions regarding Appellant's defense that "legal title and permission to the subject vehicle was entrusted to him pursuant to written contract" constitutes infirming reversible error.

6. Trial court's instruction to the jury over Appellant's continuing objection with respect to the presumptions contained in Vehicle Code Sec. 10855 and Penal Code Sec. 484, deprived Appellant of his constitutional rights to a jury trial and fair trial and otherwise constitutes fatal reversible error.

7. Trial court's refusal to admonish and prohibit the prosecution for its misconduct in presenting prejudicial charts and graphs not in evidence to the jury and prosecutor's reference to such documents through the course of the trial and other prosecutorial misconduct constitutes infirming reversible error and denied Appellant's right to a fair trial.

8. Trial court's failure to grant Appellant's Motion to Dismiss on the grounds that the subject criminal proceeding is a prosecution for a "civil debt", for enforcement of a "civil contract," constitutes reversible error.

9. The court's refusal to dismiss the complaint on the grounds that the statutes in question are void for vagueness and

ambiguity thereby, denying Appellant his due process rights constituting reversible error.

10. Trial court's refusal to grant Appellant's Motion to Dismiss at close of People's case on the basis of insufficient evidence constitutes reversible error.

11. Trial court's refusal to grant Appellant's Motion for Mistrial and for Motion for Judgment Notwithstanding the Verdict constitues prejudicial, reversible error and gross abuse of discretion.

12. Trial court's refusal to strike People's Jury Instructions or to Accord Appellant Hearing on Jury Instructions constituted prejudicial reversible error and abuse of discretion.

13. Trial court's refusal to grant Appellant a Probation Hearing and accord him a Pre-Sentencing Report after it had set the matter for probation hearing on May 13, 1986 -- together with arbitrary and capricious pre-sentencing conditions and revocation of Appellant's own recognizance status and placing him under excessive bail and physical danger constituted a denial of due process of law and is reversible error.

14. Trial court's denial of Appellant's Motion for Judgmen in Arrest of Proceedings for Fraud and Trial Irregularities including jury tampering and constituted reversible error.

15. Court's failure to properly arraign Appellant on the

subject charges- ogether with the failur of the Court to properly discharge its duties to Appellant at arraignment of sentencing and judgment denied Appellant his right to a fair trial.

16. Trial court's refusal to permit inquiry and questioning by Appellant into juror pool and the undue/restriction voir dire into bias and conflict of interests of jurors constitutes infirming reversible error.

17. The trial court ex parte, in collusion with The People, conspired to fix the jury pool and jurors assigned to the case, and the jury verdict entered on March 24, 1986 was secured by fraud, trickery, deceit and conspiracy between the trial court and The People and various jurors and alternate jurors.

18. The verdict of the jury entered on March 26, 1986 is unsupported by any evidence and was the product of a common enterprise to harm Appellant irreparably and his reputation and livelihood and secured by fraud.

19. The trial court's denial of Appellant's Motion For a New Trial constituted infirming reversible error.

20. The trial court's failure to admit Appellant's evidentiary exhibits and/or Take Mandatory Judicial Notice of Legal Proceedings in which Appellant was participating in California and other forums constituted infirming reversible error

21. Trial Court's refusal to Strike People's Evidentiary Exhibits that were NOT properly authenticated constituted infirming reversible error and should have been suppressed.

22. The trial court's imposition of sentencing Appellant to six (6) months in County Jail with no probation--together with three (3) years of parole--is a cruel, unusual punishment and in excess of the statute and unconstitutional, and must be vacated forthwith, especially in light of the fraud associated with the subject sentencing to prevent Appellant from prosecuting other matters as an attorney and/or plaintiff.

23. For such further grounds as appear from the Transcript of Evidence to be filed herein, including, but not limited to the fact that the subject arrest and consequent proceedings were a fraud, nullity and carried out in total absence of any probable cause and trial court's refusal to dismiss proceedings were in concert with third parties to harm and falsely imprison Appellant.

NOTICE TO PREPARE REPORTERS TRANSCRIPT

As part of his Proposed Statement, Appellant specifically gives notice to prepare and designate the following reporters transcripts and requests that said evidence be prepared, certified, and made a part of his statement herein:

1) All those pre-trial proceedings in the subject litigation occurring on June 27, 1985 in Division IV.

2) All those pre-trial proceedings in the subject litigation occurring on July 1, 1985 in Division IV.

3) All those pre-trial proceedings in the subject litigation occurring on August 9, 1985 in Division IV.

4) All those pre-trial proceedings in the subject litigation occurring on October 20, 1985 in Division IV.

5) All those pre-trial proceedings in the subject litigation occurring on December 2, 1985 in Division IV and Division V.

6) All those pre-trial proceedings in the subject litigation occurring on December 16, 1985 in Division V.

7) All those pre-trial proceedings in the subject litigation occurring on January 12 and January 13, 1986 in Division V.

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8) All those pre-trial proceedings occurring in the subject litigation in Division II on March 7, 1986.

9) All those trial proceedings occurring in the subject litigation commencing on March 17, 1986 in Division V before Judith O. Stein with jury selection and voir dire and trial proceedings on March 18, 1986, March 19, 1986, March 20, 1986, March 21, 1986 and March 24, 1986.

10) All those proceedings occurring in the subject litigation on March 28, 1986 in Division V.

11) All those proceedings occurring in the subject litigation on April 4, 1986 in Division V.

12) All those proceedings occurring in the subject litigation on April 7, 1986 and April 8, 1986 in Division V.

DATED: June 14, 1986

BY: _____
EUGENE J. CARELLA, ESQ.
APPELLANT

EUGENE JOHN CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, California 90067-0292

Appellant

ORIGINAL FILED
FEB 0 5 1988
COUNTY CLERK

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

EUGENE JOHN CARELLA, Appellant, vs. PEOPLE OF THE STATE OF CALIFORNIA, Respondent.	) Appeal No. CRA 24001)) LAMC M 83675 (Beverly Hills))) APPELLANT'S MOTION FOR DISQU) FICATION OF JACK NEWMAN, ALF) MARGOLIS, FREDERICK WOODS,) ROBERT ROBERTSON, JUDGES OF) LOS ANGELES SUPERIOR COURT) APPELLATE DEPARTMENT; MEMORA) DUM OF POINTS AND AUTHORITIE DECLARATION OF EUGENE JOHN CARELLA, ESQ.

COMES NOW EUGENE JOHN CARELLA, ESQ., Appellant herein, pursuant to the Rules of Court, and does hereby and herewith move for the immediate disqualification and recusal of Jack Newman, Alfred Margolis, Frederick Woods, Robert Robertson, Judges of the Los Angeles Superior Court Appellate Department, and that each of them be and stand recused, prohibited and proscribed from taking any further action on the aforestated appeal, and that a successor panel be appointed to hear, adjudicate, and otherwise preside over the conduct of the appeal and proceedings and matters related thereto in the above-styled appeal by the Chairperson of the Judicial Council

in accordance with law.

Said motion is made for cause pursuant to § 170.3(c) of the Rules of Court and to protect Appellant's right to receive a fair trial and appellate determination of his cause.

In support of said motion for disqualification of the aforestated judges, Appellant respectfully shows his Declaration identified as EXHIBIT "A" attached. Said motion is further based on all papers, pleadings, documents, records, and the like on file herein -- together with the memorandum of points and authorities; and such further and additional evidence as may be adduced at the hearing hereon.

DATED: February 4, 1988

BY: _____
EUGENE JOHN CARELLA, ESQ.

DECLARATION OF EUGENE J. CAPELLA, ESQ.

I, EUGENE JOHN CAPELLA, ESQ., declare and state as follows:

1. That I am the appellant in Appeal No. CRA 14001.

2. That I make the instant written declaration pursuant to § 170.3(c)(1) objecting in no uncertain way for cause to having the hearing or trial or any aspect of the subject proceeding being adjudicated by Frederick Woods, Alfred Margolis, Jack Newman, Robert Robertson, Judges of the Los Angeles Superior Court Appellate Department, and specifically and unequivocally demand they forthwith cease and desist in the subject proceeding and stand recused.

3. That I am informed and thereon state the aforenamed judges are disqualified on the following grounds:

The judges, and each of them, have personal knowledge of disputed evidentiary facts pertaining to the proceeding and have gained said knowledge of the subject underlying proceedings and facts through ex parte sources not parties to the appeal and agreed in furtherance of a criminal conspir to violate appellant's civil and constitutional rights and to falsely imprison Appellant, a distinguished federal practitioner, notwithstanding the evidence or the merits of his appeal and to rule against him on every issue herein.

4. That the judges have been instructed by third parties, including the National Security Council, Central

Intelligence Agency, U. S. Department of Justice and others to rule against Appellant in the within appeal and to otherwise deny him a fair hearing and appeal, and to falsely imprison appellant and to deny him preparation of a reporters transcript of trial proceedings.

5. That each judge's recusal is required in the interest of justice, and because a person aware of all the facts would entertain a "substantial doubt" that the judges would be able to impartially discharge his duties to Appellant and to adjudicate the merits of his appeals fairly.

6. That each of the named judges has gained knowledge of the proceedings from extra-judicial sources and persons, impairing the discharge of their duties fairly and even-handedly to appellant.

7. That the judges, and each of them, is grossly biased and prejudiced against me, and has acted, and continue to act, in furtherance of a criminal racketeering conspiracy, interstate in nature, to falsely imprison me and to deprive me of my constitutional rights and liberties of life, liberty and property, and I learned on February 4, 1988 that said judges have ruled to deprive and deny me the preparation and filing of the reporters transcripts of trial evidence, making it impossible for me to vindicate the twenty-three (23) grounds on appeal and despite my status as being indigent

and financially unable to pay for said transcripts.

8. That I learned today from the Clerk of the Superior Court Appellate Department the true names and identities of said appellate judges and that said judges have ruled to deny me the reporters transcripts at public expense even though I am indigent and even though the State Supreme Court in In Re Armstrong, 126 C.A. 3d 565 makes it mandatory that I be furnished said reporters transcripts at public expense.

9. That I am informed and believe and thereupon state that said judges have been offered consideration to rule against me in the subject appeal and to deny my motion for transcripts by third persons not associated with said proceedings.

10. That I specifically request the Judicial Council's intervention to appoint a judge to adjudicate this disqualification petition and grant me a hearing on said disqualifications.

11. That the foregoing statements and written declaration are made and filed in good faith to protect appellant's constitutional rights herein and to prevent against further criminal misconduct against Appellant.

I declare the foregoing is true and correct to

the best of my knowledge and ability.

Executed on this 4 day of February 1988 in Los Angeles, California, under penalty of perjury.

EUGENE JOHN CARELLA, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

"DISQUALIFICATION OF JUDGES" PROVISIONS OF THE RULES OF COURT CONTEMPLATE RESPONDENT JUDGES OF THE SUPERIOR COURT, APPELLATE DEPARTMENT, AND ARE CLEARLY APPLICABLE IN ADJUDICATING THE MOTION FOR DISQUALIFICATION OF JUDGES MARGOLIS, WOODS, NEWMAN AND ROBERTSON.

Section 170.5

II.

RESPONDENT APPELLATE JUDGES ARE ONLY EXEMPTED FROM SECTION 170.6 DISQUALIFICATION CHALLENGES AND NOT SECTION 170.3, ET SEQ. CHALLENGES AS MADE BY APPELLANT HEREIN.

Section 170.7
Section 170.3(a)

III.

JUDICIAL COUNCIL MUST BE APPOINTED BY THE CLERK OF THE SUPERIOR COURT FORTHWITH TO ADJUDICATE THE SOUGHT FOR DISQUALIFICATION OF RESPONDENT JUDGES BY APPELLANT.

Section 170.3(c)(4)(5)

IV.

THAT APPELLANT'S MOTION FOR DISQUALIFICATION AND ACCOMPANYING AFFIDAVIT CONSTITUTE A PRIMA FACIE SHOWING OF DISQUALIFICATION PER SE AGAINST SAID RESPONDENT JUDGES OF THE LOS ANGELES SUPERIOR COURT APPELLATE DEPARTMENT REQUIRING THEIR IMMEDIATE RECUSAL AND VACATING OF ANY AND ALL JUDGMENTS, ORDERS RENDERED BY SAID APPELLATE RESPONDENT.

Section 170.3(c)

CONCLUSION

FOR ALL THE FOREGOING REASONS, Appellant respectfully prays that an Order forthwith issue declaring that Respondent Judges of the Los Angeles Superior Court, Jack Newman, Alfred Margolis, Frederick Woods, Robert Robertson be and stand recused, and that the Judicial Council be summoned immediately to adjudicate said disqualification motion and to act promptly to disqualify said judges and to appoint a new appellate panel consisting of four members who are free from bias, prejudice, animous, discrimination against Appellant and who are not acting on an ex parte basis to falsely imprison Appellant and deny him his basic constitution rights, and that any and all orders, rulings, etc. made by said Respondent Judges Margolis, Newman, Woods, Robertson be forthwith vacated in accordance with law.

DATED: February 4, 1988

BY:
EUGENE J. CAPELLA, ESQ.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this the____day of February I served a true copy of the foregoing Appellant's Motion for Disqualification of Alfred Margolis, Jack Newman, Frederick Woods, Robertson, Judges of Los Angeles Superior Court Appellate Department; Memorandum of Points and Authorities; Declaration of Eugene John Carella, Esq. on all parties of record by first class maill, postage prepaid, addressed as follows:

IRA REINER
District Attorney
849 S. Broadway
11th Floor
Los Angeles, CA 90014

/S/
Eugene J. Carella

EUGENE JOHN C.. .A, ESQ.
P. O. Box 67292
Century City
Los Angeles, California 90067-0292

Appellant

ORIGINAL FILED
FEB 17 1983
COUNTY CLERK

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

EUGENE JOHN CARELLA, Appellant, vs. PEOPLE OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. CRA 24001 LAMC M 83675 APPELLANT'S PETITION FOR REHEARING AND APPLICATION FOR TRANSFER; DECLARATION OF EUGENE JOHN CARELLA; DECLARATION OF PAULA PFISTER; MEMORANDUM OF POINTS AND AUTHORITIES.

TO: JUDGES OF APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, CENTRAL DISTRICT [WITHOUT WAIVER OF DISQUALIFICATION TO JUDGES NEWMAN, MARGOLIS, WOODS, ROBERTSON)

COMES NOW EUGENE JOHN CARELLA, ESQ., Appellant herein, without waiver of disqualification to Judges of Appellate Department of Superior Court of California, County of Los Angeles Central District, as constituted pursuant to the Rules of Court and the Supreme Court mandate in In Re Armstrong, 126 CA 3d 565, 178 CR 902 (1981), and moves this Court for an Order of Rehearing and Reconsideration of the Memorandum Judgment of

February 3, 1988 and further order that a complete Transcript of Proceedings in the void and criminally-inspired and orchestrat trial proceedings, the subject of this appeal, be prepared and provided to Appellant at public expense and concurrently filed with the Appellate Department of the Superior Court to be used in the adjudication of Appellant's appeal now pending before this Court.

In support of the subject petition of rehearing and reconsideration, Appellant shows this Court the Declaration of Eugene J. Carella, Esq. and Paula Pfister, demonstrating prima facie the fraud committed by the trial court and People in the preparation of the trial evidence as reflected in the Certified Settled Statement settled by the trial court who was disqualified; the egregious abrogation of Appellant's constitutional due process and equal protection rights to have a complete transcript of trial evidence prepared at public expense and filed as part of the record to document his twenty-four (24) grounds on appeal; and a gross misapplicati and misapprehension of facts and law by the Appellate Department the members of which are the subject of vigorous disqualificati foreclosing further action and invalidating prior action who have in common enterprise with the trial judge excised and obstructed material evidence from Appellant's record on appeal, all of which summate to deny Appellant-Petitioner herein a fair trial, and constitutionally sufficient adjudicati on appeal. Appellant prays his Petition for Rehearing be granted and that the Appellate Department's judgment of Febru

1988 affirming the judgment of the trial court be promptly vacated by a panel of this Court free from bias and prejudice against Petitioner and that the judgment of conviction be vacated post haste because of gross, irreparable and infirming injury and fraud carried out against Appellant, denying Appellant's fundamental right to due process and equal protection of law and a fair trial and fair adjudication on appeal.

Said petition is based on all papers, pleadings, declarations, and the like on file here -- together with memoranda of points and authorities and said further and additional evidence as may be adduced.

DATEAD: February 17, 1988

BY: Eugene John Carella, Jr.
EUGENE JOHN CARELLA, ESQ.

Appellant

DECLARATION OF PAULA E. PFISTER

I, PAULA E. PFISTER, declare and state as follows:

1. That I reviewed the testimony alleged to have been furnished by me at the time of trial of Eugene J. Carella as represented in the Certified Settled Statement.

2. That the testimony I actually rendered at the trial has been significantly and substantially altered and the statements ascribed to me in the settled statement are not true and correct and are known to be inaccurate by the trial judge and District Attorney.

3. That at the time of trial I testified that I was physically with Mr. Carella on the late afternoon of May 11, 1985 when Mr. Carella physically visited the rental offices of MPG Car Rental at the intersection of Doheny and Wilshire Boulevard.

4. That I further testified that it was my knowledge that Mr. Carella had substantial monies with him when he went to the MPG Car Rental office and did for the purpose of making further and additional payment on his account.

5. That I further testified that MPG Car Rental Office and the Union 76 Service Station physically adjoin one with another and that Mr. Carella after not being able to locate anyone at MPG inquired at the Union 76 station if they knew

EXHIBIT "A"

where the MPG personnel were or if they could accept payment for them.

6. That I also testified that Mr. Carella also secured gas from the Union 76 at Doheny/Wilshire adjoining the MPG office after he could not find anyone and secured a receipt signed and stamped May 11, 1985, which receipt would not be permitted to be entered as evidence at the time of trial.

7. That I further testified that Mr. Carella was physically present and in Los Angeles and at the Century Wilshire Apartment location where he resided for a period of approximately two (2) years at all material times and for each and every night in 1984 and 1985, excepting a weekend visit to Palm Springs, and lived in the Los Angeles area and was prosecuting legal matters in the state and federal court located in Downtown Los Angeles regularly and had made various appearances in these courts during this time in question.

8. That I further state that while on the witness stand Mr. Carella showed me a copy of the receipt he received from the Union 76 service station dated May 11, 1985 which he sought to have me authenticate and sought to introduce the receipt into evidence, but the court would not let him.

9. That I further state that I personally accompanied Mr. Carella on June 20, 1985 (one week before the false arrest to the law offices of Roper & Tolino located at 3255 Wilshire

Boulevard and attended a conference scheduled by Charles Woodmansee, a court-appointed referee (Jack Newman involuntarily appointed him), in litigation in which Mr. Carella and I were both plaintiffs, e.g., Eugene J. Carella, Esq., Paula Pfister v. Sheraton Corporation, LASC No. 516 399, where Mr. Carella and myself are suing for Unruh Civil Rights violations and false imprisonment, assault and batter charges and numerous other claims for damages and injunctive relief.

10. That I further state that I had personal knowledge that Mr. Carella also during the week of June 20, 1985, a few days before the false arrest, physically visited and met with Roscoe Jones, Director of the Federal EEOC (Equal Employment Opportunity Commission) in Los Angeles, located at 3255 Wilshire Boulevard, the same location of Roper & Folino, and filed a housing and employment discrimination charge with that office still pending with that Federal commissio

11. That I further state that I know that Mr. Carella on June 18, 1985 just nine (9) days before the subject false arrest was in the U. S. District Court for the Central District of California seeking to be heard on the question of $140,000 of attorney fees owed to him in litigation commenced against General Electric, Inc. and his attorney lien granted him by the district judge. This Court is located at 312 N. Spring Street, Los Angeles, California.

12. That Judge Judith Stein prevented Mr. Carella

from introducing evidence of any of these proceedings and/or to take mandatory judicial notice of them, even though Mr. Carella diligently sought to have such evidence introduced at the time of trial on March 17, 1986, and thereafter.

12. That I have specifically reviewed the settled statement certified by Judith Stein on August 17, 1987, and, in particular, the summary of my testimony. The testimony assigned to me is distorted and altered substantially, to wit: 1) I testified I traveled with Mr. Carella to MPG Rental office on the late afternoon of May 11, 1985, not the evening; 2) the statement that she knew that appellant had a large amount of cash on him at the time (May 11, 1985) is true, but the following statement..."she did not know what he was going to do with the money" is an outright lie and falsehood, and known to be such.

13. That I further specifically state that while on the witness chair I was harassed, intimidated and threatened by the trial judge Judith Stein and that she had also violated my rights when I was absent from the courtroom by having my person and purse searched over my protestation and when there was no reason for this conduct.

14. That I further state that the subject rental vehicle was put in a Century Wilshire parking space which was accessible to inspection each and every night in question, located at 10776 Wilshire Boulevard--a little more than a

mile from the MPG Car Rental offices.

15. That I further state that I was percipient to Mr. Carella's false arrest at the Century Wilshire Apartments in the early morning of June 27, 1985 when I heard Mr. Carella inform Detective Schwab that he had spoken to Jennifer Ayres of the Beverly Hills Police Department who advised him "that 'Schwab' was on an extended vacation."

16. That I am aware that Mr. Carella had gone to the Beverly Hills Municipal Court to see the court reporter Robert Marsh (September 1985) on the transcripts when he was ordered arrested again by Judith Stein to prevent him from obtaining the subject transcripts and documenting his appeal.

17. That I had filed a complaint with the Police Department of Inglewood and the District Attorney's office just prior to the false arrest of Mr. Carella on the grand theft and conversion of all my property, files and possessions acquired over a twenty (20)+-year period and monies taken under false pretenses for the safekeeping of this property. Mr. Carella's property, files and possessions and monies were also with this property that was converted/thefted.

18. That the Police Department and District Attorney's office refused to do anything about this matter, and shortly thereafter caused the false arrest of Mr. Carella for the same charges I lodged with them on the theft/conversion of

our property.

The foregoing statements are true and correct to the best of my knowledge and ability.

Executed on this 17th day of February 1988 in Los Anageles, California under penalty of perjury.

/s
Paula Pfister

DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE J. CARELLA, ESQ., declare and state as follows:

1. That I am the appellant-petitioner herein.

2. That the foregoing declaration is made in support of my petition for rehearing and application for transfer to the Court of Appeal made alternatively on said petition.

3. That the subject rehearing petition is filed pursuant to Rule 107 of the Rules of Court.

4. That I further state the judgment of the Appellate Department is so grossly infected with constitutional infirmities, as is the trial judgment, that I am seeking and fully intend to seek appropriate intervention by the Court of Appeal and/or State Supreme Court and/or United States Supreme Court to have the subject fraudulent judgment vacated and thrown out because my constitutional rights to a fair trial and for hearing have been irreparably and irrevocably violated.

5. That I am accordingly requesting that this Court stay the issuance of remittitur consistent with Rule 144(c) of the Rules of Court should it not be disposed to grant the instant petition for rehearing to enable me sufficient time to have the constitutional injuries and infirmities complained of reviewed and redressed by a higher court.

6. That I specifically incorporate the declaration of

EXHIBIT "B"

Paula E. Pfister identified as EXHIBIT "A" [illegible] attached herewith as being recited in support of this declaration.

7. That the Appellate Department decision, the subject of the petition for rehearing, is grossly defective and constitutionally infirmed for the following reasons:

(a) It was rendered by Appellate Department judges who are disqualified and the subject of a disqualification for cause petition, requiring all orders, judgments and the like of said Appellate Department be vacated;

(b) It is infirmed because Appellant, who is financially indigent, has been deprived of his fundamental constitutional right to a Reporters Transcript of Trial Evidence furnished him and made a part of the Record on Appeal to document his twenty-four (24) grounds for appeal. (In Re Armstrong, 126 CA 3d 565, 128 CR 902 (1981);

(c) The settled statement certified by the trial court is a fraud, sham, nullity and not drawn in conformity with the Rules of Court or mandates of the Supreme Court of the State. (See, People v. Jenkins), and should be stricken.

(d) The memorandum judgment willfully mistates evidence and falsely indicates a waiver by Appellant of his constitutional right to a speedy trial which is in direct contradiction to what actually occurred at the pre-trial proceedings;

(e) The memorandum judgment consciously and willfully fails and refuses to consider and address each of the grounds for appeal set forth in the certified settled statement, each of which requires that the trial court judgment be vacated and thrown out as a matter of law;

(f) That the judgment misapprehends the law with respect to mandatory jury instructions and sua sponte instruction required to be made by the trial judge and further ignores the notice and demand requirements mandated by due process consideration before jury instructions on the presumption of Sections 484 and 10855 of the Penal Code and Vehicle Code can be given;

(g) The combination of the Appellate Department's conscious refusal to order the complete Reporters' Transcripts of Trial Evidence, at the same time it seeks to conclude that no evidence exists to document Appellant's grounds of appeal constitutes an actionable fraud on Appellant and taints the judgment.

8. That I specifically state that in January 1986 prior to the start of the actual trial proceedings, in open court before visiting Judge Morse I had the Court Reporter Douglas Weaver read his notes for the actual proceedings that occurred before Commissioner Murphy on June 27, 1985 and July 1, 1985. At that time, in open court, Mr. Weaver specifically stated that his notes for the subject days stated showed that Appellant "did NOT waive his right to a speedy trial" in response to

the Commissioner's direct questions of waiver.

9. That the court docket in this regard is obviously false, incorrect, and was to have been corrected by Robert Tauger, Clerk in Division 5, who was aware of the incorrect docket entry showing a 'waiver.'

10. The Appellate Department judgment is therefore infirmed because it is based on false and mistaken facts and the Reporters Transcripts will so verify.

11. That the Appellate Department judgment also failed to specifically address the gross error committed by the trial court by refusing to grant Appellant a pre-sentencing probation hearing, at the same time it immediately sentenced Appellant and refused to stay the sentencing and judgment pending his appeal in derogation of the laws of this State.

12. That I further state the Reporters Transcripts of Trial Proceedings demanded by me to be made a part of the Record demonstrate prima facie the validitiy of the twenty-fo (24) grounds for appeal recited by me in my Proposed Settled Statement and command the judgment, the subject of this petition, and the underlying trial court judgment, be forthwith vacated. Accordingly, I specifically demand that the Reporters Transcripts be prepared and filed with this Court at public expense.

13. That two (2) salient grounds for appeal conspicuously

not addressed and omitted by the Appellate Department are the disqualification of the trial court moved by Appellant as reflected on the docket sheet which renders null and void all orders of the trial judge, and the gross acts of prosecutorial misconduct ranging from disparaging references of Appellant to the use of diagrams, charts and documents not authenticated or moved in evidence during the course of the trial.

14. That I advised the Appellate Department as far back as October 1986 that the trial judge, who is disqualified, had consciously interfered with and obstructed my rights to secure the Reporters Transcripts by having me falsely arrested after I was ordered by the Appellate Department to secure from the Court Reporter Marsh information concerning said Reporters Transcripts.

15. That my right to secure the subject transcripts at public expense is a fundamental constitutional due process right which is essential to ensure me a fair trial and fair appellate adjudication of my rights on appeal.

16. That Judges Newman, Margolis, Robertson and Woods are disqualified from acting in these proceedings and I specifically demand a successor Appellate Department appointed in accordance with law be convened to adjudicate my appeal and all the grounds asserted therein on the basis of a complete and true record on appeal, including the Reporters Transcripts of Trial Proceedings and that they be preempted from acting further herein.

17. That I specifically incorporate my Motion and Demand for Reporters Transcripts at Public Expense, together with Exhibits filed with the Appellate Department on January 26, 1988 into the within declaration.

I declare that the foregoing is true and correct to the best of my knowledge and ability.

Executed on this 17th day of February 1988 in Los Angeles, California, under penalty of perjury.

/s/

EUGENE JOHN CARELLA, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

Statement of the Case

Appellant, a distinguished federal practitioner, was falsely arrested and imprisoned for the "theft" of a rental automobile he secured pursuant to a rental car contract and for which he paid valuable cash consideration in advance. Permission, consent and authorization were furnished to Appellant pursuant to the rental contract. The subject automobile was parked each and every night at Appellant's residence in Westwood located a little more than a mile from the MPG Car Rental offices and easily accessible and observable by MPG personnel.

Appellant has asserted that the entire trial proceedings constituted a nightmarish litany of egregious, heinous, and unprecedented judicial and constitutional abuses perpetrated by the trial judge, Judith Stein, who was hand-picked to falsely incarcerate Appellant to rig the jury pool and jury selection and to deprive Appellant of every major constitutional right and guarantee any American citizen should expect. To obscure and defense her complicity in the criminal racketeering conspiracy against Appellant, the trial judge, whose disqualification was sought by Appellant, has acted during the post-trial phase of the proceedings to frustra the right of Appellant to secure and file the Reporters Transcr of Trial Proceedings evidencing the gargantuan constitutional irregularities inflicted upon Appellant at trial and subsequent thereto.

Prior to this appeal being scheduled for oral argument on January 28, 1988, on the basis of the financial indigency imposed upon Appellant as a result of these vexatious and false criminal proceedings, he moved this Court for a Reporters Transcript at public expense. Notwithstanding the automatic right to secure said transcripts guaranteed by the Constitution, the Appellate Department willfully denied said motion. (See, In Re Armstrong, supra.) Appellant had also previously sought to have a settled statement certified in accordance with the laws in this State. (See, People v. Jenkins, supra) which was also rebuffed by the Appellate Department.

Appellant, because of the enormous bias, prejudice, and animous manifested by the Appellate Department in securing the Reporters Transcript, and learning of this refusal on February 4, 1988, moved for the immediate disqualification of said Appellate Department, consisting of Judges Newman, Margolis, Woods, Robertson. After having moved for said disqualification of said Appellate Department judges, Appellant/learned Appellate Department, while at the same time they consciously rebuffed Appellant's fundamental constitutional right to have a reporter's transcript of trial evidence filed to document his twenty-four (24) grounds on appeal, had concurrently rejected Appellant's appeal "on the merits," finding there to be "no evidence" to support Appellant's grounds on appeal. Further, said Appellate Department considered only two or three of the twenty-four (24) grounds for appeal recited by Appellant, notwithstanding that each of the grounds are meritorious

on their face. The order of the disqualified Appellate Department in its present format is a "virulent affront" to constitutional liberty in this country and unless corrected by rehearing and reconsideration constitutes a debauchery of constitutional jurisprudence and value which cripples our entire system of law.

To permit a corrupt trial judge to inflict such enormous constitutional deprivations upon Appellant at the time of trial is reprehensible; to have a specifically-selected Appellate Department acting in common enterprise with that trial judge to bury the evidence with the Appellant is a crime of the highest order.

II.

AN APPELLATE DEPARTMENT CONSTITUTED IN ACCORDANCE WITH LAW MUST VACATE THE NON-FINAL JUDGMENT AND DIRECT REHEARING OF THE SUBJECT APPEAL TO ENSURE APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Rule 107
California Rules of Court

III.

DISQUALIFIED APPELLATE JUDGES MUST VACATE ANY AND ALL ORDERS, JUDGMENTS, OR THE LIKE MADE OR RENDERED BY THEM PRIOR TO THEIR DISQUALIFICATION BEING RECORDED.

Section 170.3
California Rules of Court

IV.

FAILURE OF THE TRIAL COURT TO FURNISH APPELLANT A PRE-SENTENCING PROBATION HEARING UPON DEMAND, CONJOINED WITH HIS IMMEDIATE MISDEMEANOR SENTENCING ABRIDGES DUE PROCESS RIGHT TO A FAIR TRIAL AND IS PER SE REVERSIBLE ERROR.

Fourteenth Amendment
U. S. Constitution

V.

APPELLATE DEPARTMENT HAS MANDATORY OBLIGATION TO FURNISH INDIGENT APPELLANT WHO TIMELY DEMANDS REPORTERS TRANSCRIPTS OF TRIAL EVIDENCE AT PUBLIC EXPENSE AND WHO ASSERTS INSUFFICIENCY OF EVIDENCE, GROSS PROSECUTORIAL MISCONDUCT, AND INFIRMING TRIAL COURT BIAS, PREJUDICE, AND DISCRIMINATION IN HIS GROUNDS FOR APPEAL, WITH TRANSCRIPT AND FAILURE OF APPELLATE DEPARTMENT TO SO ACT, CONSTITUTES FATAL ERROR, REQUIRING APPELLATE JUDGMENT AND UNDERLYING JUDGMENT BE THROWN OUT.

In Re Armstrong, supra.

VI.

APPELLATE DEPARTMENT JUDGMENT BASED ON FALSE, FRAUDULENT, AND INCORRECT DOCKET ENTRY, SHOWING WAIVER OF RIGHT TO SPEEDY TRIAL WHEN ACTUAL REPORTERS' TRANSCRIPTS OF ARRAIGNMENT PROCEEDINGS EVIDENCE NO WAIVER OF THESE RIGHTS

IS FLAWED AND MUST SUCCUMB ON REHEARING.

VII.

APPELLATE DEPARTMENT REFUSAL TO CONSIDER AND TO REVIEW AND RESPOND TO EACH OF APPELLANT'S GROUNDS FOR APPEAL (TWENTY-FOUR IN NUMBER), WHICH CONSTITUTE REVERSIBLE ERROR, ABUSE OF DISCRETION OR OTHERWISE INFIRM TRIAL COURT JUDGMENT, COMMANDS THAT THOSE GROUNDS NOT CONSIDERED BE REVIEWED AND REHEARD ON THE MERITS AND A PETITION FOR REHEARING OF THE APPEAL BE ORDERED.

People v. Jenkins, 55 CA 3d. Supp. 55 (1976)

VIII.

APPELLATE DEPARTMENT RELIANCE UPON A "CERTIFIED" SETTLED STATEMENT" SHOWN TO BE A CONSCIOUS FRAUD, MISSTATEMENT, AND PREVARICATION OF TESTIMONY AND OTHER EVIDENCE COMMITTED BY THE DISTRICT ATTORNEY ACTING IN COMBINATION WITH TRIAL JUDGE AND DISQUALIFIED/ APPELLATE JUDGES USED TO AFFIRM JUDGMENT IS PER SE GROUNDS FOR REHEARING, REQUIRING SAID PETITION FOR REHEARING BE GRANTED.

Rule 187, Rules of Court

IX.

APPELLATE DEPARTMENT MISAPPREHENSION OF DUE PROCESS REQUIREMENTS IN HEDRICK AND HEMMER MANDATES INVALIDATES JUDGMENT AND COMPELS REHEARING AND RECONSIDERATION AS A MATTER OF LAW.

People v. Hemmer, 19 Cal.App. 3d
People v. Hedrick, 105 Cal App.

CONCLUSION

FOR ALL THE FOREGOING REASONS, Appellant-Petitioner herein, respectfully prays that the Order entered February 3, 1988, appended as EXHIBIT "C", the subject of the Petition for Rehearing, be reheard and reconsidered.

Appellant further prays that the subject judgment in Appeal No. CRA 24001 after being reheard be forthwith vacated and that a new judgment be entered vacating and throwing out the trial court judgment fraudulently entered April 7, 1986 by Judith Stein because it is wrought with gross constitutional infirmities and judicial error. Alternatively, Appellant asks the judgment be reheard and the appeal be reinstated for hearing for such further and additional argument as may be required by a newly-constituted Appellate Department.

Moreover, should this Court not grant the instant petition, Appellant demands the Appellate Department certify a transfer of the subject appeal to the Court of Appeal in accordance with Rules 62, 63 of the Rules of Court to ensure uniformity of decisions and to protect the integrity of constitutional guarantees that exist in Appellant's favor heretofore evidenced herein. Appellant-Petitioner also respectfully prays that pursuant to Rule 144, the remittitur of the instant appeal be stayed until further order and until Appellant has exhausted his rights to secure intervention

from the Court of Appeal, Supreme Court for the State of California, and/or United States Supreme Court. Said request of stay of remittitur is being made in good faith to fully protect Appellant's fundamental due process guarantees and for such further and additional relief as the Court deems necessary and proper.

DATED: February 12, 1988

BY: /S/
EUGENE J. CARELLA, ESQ.

FILED

FEB 03 1988

FRANK A. ZOLIN, County Clerk

Alan Harding

BY ALAN HARDY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. EUGENE JOHN CARELLA, Defendant and Appellant.	Superior Ct. No.CRA24001 Municipal Court of the Beverly Hills Judicial District No. M83675 MEMORANDUM JUDGMENT

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is affirmed.

Defendant contends that the trial court erred in instructing the jury concerning the presumptions contained in Penal Code section 484 subdivision (b) and Vehicle Code section 10855. We do not agree. Both presumptions are presumptions affecting the burden of producing evidence. (See People v. Hamrer (1971) 19 Cal.App.3d 1052, 1060-1062.) The effect of such presumptions, under Evidence Code section 604, is to require the trier of fact to assume the existence of the

EXHIBIT "C"

- 21 -

presumed fac. .ess and until evidenc. s introduced which would support a finding of its nonexistence. (See People v. Hedrick (1980) 105 Cal.App.3d 166, 170.) Here, unlike the defendants in Hemmer and Hedrick, defendant never offered testimony concerning the nonexistence of the presumed facts stated in Penal Code section 484 subdivision (b) and Vehicle Code section 10855. We find no error.

Defendant next contends that the trial court erred by not giving an instruction concerning a good faith belief or mistake of law or fact. However, defendant offered no evidence to support the giving of such instructions. Again, there was no error. (People v. Vineberg (1981) 125 Cal.App.3d 127, 138.)

Next, the court docket directly contradicts defendant's contention that he did not waive time on July 1, 1985. Thus, the record shows there was no violation of defendant's speedy trial rights.

Defendant contends that the court was required to stay judgment and sentencing pending defendant's appeal. The record, however, shows that the trial court set bail for defendant pending his appeal. Such was all that was required. (Pen. Code, § 1272(2).)

Defendant next claims that the trial court erred by not obtaining a pre-sentencing probation report before sentencing defendant. The trial court had no mandatory duty to do so. (Pen. Code, § 1203(d).)

Our review of the record convinces us that substantial evidence supports defendant's conviction. (People v. Johnson (1980) 26 Cal.3d 557, 562.)

TATATAT. FS 12 84

We not address defendant emaining contention. (Cal. Rules of Court, rule 105(c); see People v. Merrien (1967) 66 Cal.2d 390, 397.) We observe, however, in our review, no evidence to support appellant's contention.

Presiding Judge

We concur.

Judge

Judge

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this the ____day of February 1988 I served a true copy of the foregoing Appellant's Petition for Rehearing and Application for Transfer; Declaration of Eugene John Carella; Declaration of Paula Pfister; Memorandum of Points and Authorities on all parties of record by first class mail, postage-prepaid, in Los Angeles, California, on the following:

IRA REINER
District Attorney
849 S. Broadway
11th Floor
Los Angeles, California 90012

Judith Stein, Judge
Beverly Hills Municipal Court
9355 Burton Way
Beverly Hills, California 90210

Eugene J. Carella

EUGENE J. CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, California 90067

Appellant

ORIGINAL FILED
FEB 17 1985
COUNTY CLERK

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

EUGENE J. CARELLA, ESQ., Appellant, v. PEOPLE OF STATE OF CALIFORNIA, Respondent.	Appeal No. CRA 24001 LAMC M 83675 APPELLANT'S FORMAL STATUTORY DEMAND TO CLERK OF APPELLATE DEPARTMENT OF LOS ANGELES SUPERIOR COURT ADVISING JUDICIAL COUNCIL TO SELECT JUDGE TO ADJUDICATE DISQUALIFICATION; DECLARATION OF EUGENE J. CARELLA, ESQ.; MEMORANDUM OF POINTS AND AUTHORITIES.

COMES NOW EUGENE J. CARELLA, ESQ., Appellant herein, and does respectfully make formal demand upon the Clerk of the Appellate Department of Los Angeles Superior Court, pursuant to Rule 170.3(c)(5)(6) to notify the Executive Officer of the Judicial Council to have its vice-chairperson appoint a judge free from bias or prejudice or discrimination against Appellant or in favor of Respondent Appellate Department judges as recited in Appellant's Motion for Disqualification identified as EXHIBIT "B" and attached herewith, to adjudicate said Motion for Disqualification in accordance with law and

to accord Appellant an evidentiary hearing on said disqualification and the right to make argument thereon.

In support of said demand, Appellant respectfully shows his Declaration attached as EXHIBIT "A" herewith and Memorandum of Points and Authorities.

WHEREFORE, Appellant respectfully demands the Clerk forthwith notify the Executive Officer of the Judicial Council of the necessity of the Judicial Council to act to appoint a judge to adjudicate the moved for disqualification of Judges Alfred Margolis, Jack Newman, Robert Robertson and Fred Woods and after adjudicating order said Appellate Department recused.

DATED: February 15, 1988

BY: /s/
EUGENE J. CAPELLA, ESQ.

DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE J. CARELLA, ESQ., declare and state as follows:

1. That I am the appellant in the aforecaptioned matter.

2. That on or about February 4, 1988, shortly after learning of the identities for the first time of Appellate Department of Los Angeles Superior Court from the Clerk of Appellate Department, and after also being apprised that Appellate Department acted to deny a Reporters Transcript at public expense, even though indigent, I moved for the immediate disqualification of Judges Alfred Margolis, Jack Newman, Robert Robertson, and Fred Woods on statutory grounds as more fully appears in the Motion for Disqualification identified as Exhibit "B" attached herewith. Said motion was timely filed and served on February 5, 1988.

3. That said disqualification was sought prior to receipt and actual knowledge of an order entered by said Appellate Department on "the merits" of said appeal, which opinion was based in large measure on the lack of evidence in the record to support Appellant's claims and grounds for appeal.

4. That on February 16, 1988, I received a copy of Respondent Judges written verified answer to their disqualification and the factual allegations in support of disqualification, said verified answer filed on February 12, 1988 pursuant

Section 170.3(c)(3). Said verified response by said judges contains material alterations of facts and material omissions as will be more fully shown at the evidentiary hearing.

5. That each of the Respondent judges is prohibited from passing upon his or her own disqualification or "upon the sufficiency in law, fact, or otherwise of the statement of disqualification filed by a party."

6. That I am unable to agree to another judge with the People of the State of California (the adverse party) as to a judge to adjudicate the disqualification motion.

7. That I further state that I have strong grounds to prevent and disqualify Malcolm Lucas to act in his capacity either as chairperson of the Judicial Council or judge of the Supreme Court in this litigation in that he has acted in prior litigations conducted by me adversely in the federal court system to egregiously abrogate my federal constitutional rights and liberties and is subject to per se recusal by me and proscribed from acting herein in any capacity.

8. That Section 170.3(c)(5) compels that the Clerk of the Appellate Department of the Los Angeles Superior Court forthwith notify the Executive Officer of the Judicial Council to have the Vice Chairperson of the Judicial Council act to select a judge to adjudicate the disqualification if the chairperson is unable (because of disability stated

herein) to act to select a judge free from bias and prejudice.

9. That I herewith make an unequivocal demand to have the Clerk of the Appellate Department, Los Angeles Superior Court, act immediately to notify the Judicial Council of the need to select a judge free from bias, prejudice and discrimination against Appellant or his cause and in favor of Respondent Appellate Department judges to adjudicate Appellant's Motion for Disqualification of Respondent Appellate Department attached as Exhibit "B".

10. That I further request the Clerk to advise the Judicial Council of my demand for an evidentiary hearing on the subject motion for disqualification.

11. That I further demand that Respondent Appellate Department Judges Newman, Margolis, Robertson, Woods cease at once from all further conduct and action in the subject appeal.

I declare under penalty of perjury that the above is true and correct to the best of my knowledge and ability.

Executed on this____day of February 1988 in Los Angeles, California.

EUGENE J. CARELLA, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

Chapter 3: Disqualification of Judges.

Section Nos. 170.1, 170.2, 170.3; 170.4, 170.5, 170.6, 170.7 of the Rules of Court.

CONCLUSION

WHEREFORE, Appellant respectfully demands that the Clerk notify the Judicial Council of the need to select a judge in accordance with law to adjudicate Appellant's Motion for Disqualification, attached herewith as EXHIBIT "B" and his demand for an evidentiary hearing on said motion.

DATED: February 16, 1988

BY: EUGENE J. CARELLA, ESQ.
Appellant

CERTIFICATE OF SERVICE

I, the undersigned, do nereby certify that on this the____day of February 1988 I served a true copy of the foregoing Appellant's Formal Statutory Demand to Clerk of Appellate Department of Los Angeles Superior Court Advising Judicial Council to Select Judge to Adjudicate Disqualification; Declaration of Eugene J. Carella, Esq., on all parties of record by first class mail, postage-prepaid, in Los Angeles California, on the following:

IRA REINER
District Attorney
849 S. Broadway
11th Floor
Los Angeles, CA 90012

Eugene J. Carella

ORIGINAL

MANUSCRIPTED

IN THE

UNITED STATES SUPREME COURT

NO: 87-6997

EUGENE JOHN CARELLA,

Appellant/Defendant

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee/Plaintiff

ON APPEAL FROM ORDER AND JUDGMENT OF

THE SUPERIOR COURT, STATE OF CALIFORNIA,

FOR THE COUNTY OF LOS ANGELES

APPELLATE DEPARTMENT

Supplement to Jurisdictional Statement

MOTION TO VACATE, SET ASIDE, AND REVERSE

JUDGMENT AND ALTERNATIVE RELIEF

EUGENE J. CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

APPELLANT

COMES NOW EUGENE JOHN CAPELLA, appellant herein, in the aforecaptioned appeal, pursuant to 28 U.S.C. Sections 2104, 28 U.S.C. Section 2106, and Rules of Court 10, 11, 12 and the controlling mandates of this Court implementing said statutory provisions, and does respectfully move this Court for an Order reversing and otherwise vacating the judgment and orders now before this Court on appeal, as more fully appear in the Jurisdictional Statement and Appendix duly filed in this cause and specifically incorporated into this motion as EXHIBITS "B" and "C." Alternatively, should this Court require further and more extensive briefing on the gross constitutional invalidity of the state statutes, the subject of this appeal (e.g., Penal Code 484 and Vehicle Code Section 10851 and 10855), and the other constitutional infirmities and aberations engendered and set forth herein, Appellant respectfully prays this Court suspend, bar and prohibit any further action in or by the Los Angeles Municipal Court, Beverly Hills Judicial District and Los Angeles Superior Court, Appellate Department, each court having been divested of all jurisdiction in the above-entitled cause by virtue of the Notice of Appeal filed on April 11, 1988 and the perfecting and docketing of the subject appeal in conformity with the Rules of this Court and law, pending a final adjudication of this Appeal by the Court. The per se constitutional invalidity of the two state statutes by which the criminal misdemeanor prosecution was commenced against Appellant, and by which his false conviction and false imprisonment have been carried out, conjoined with the other constitutional injuries recited in his Appeal as more fully appears in the Jurisdictional Statement attached herein compels that all

state proceedings, including further execution upon the null and void judgment of conviction and void appellate remittitur affirming said judgment be stayed and suspended and/or vacated by this Court pursuant to the plenary powers vested in this Court by virtue of 28 U.S.C. Section 2106 (see, Grosso vs. United States, 390 U.S. 62, 19 L.Ed. 2d 906, 88 S.Ct. 709 (1967); Haynes v. United States, 390 U.S. 85, 19 L.Ed. 2d 923, 88 S.Ct. 722 (1967); and United States v. Covington, 395 U.S. 57, 23 L.Ed. 2d 94, 89 S.Ct. 1559 (1969)] and authorizing the Court to take action that is "just under the circumstances."

Further, there is substantial appellate precedent for this Court to utilize 28 U.S.C. Section 2106 jurisdiction to invoke its inherent powers to throw out and set aside a jury verdict and judgment procured by fraud and so infirmed, gross and contrary "to right or reason", and to enter an appropriate judgment of its own by way of remittitur in the cause directed to the trial court. Caddy v. American Home Products, 557 F.2d 36 (8th Cir. 1977). Further authority commanding this Court to take the action demanded by Appellant of throwing out and setting aside the void judgment and/or staying and suspending all proceedings and effectiveness of Orders in the trial court and/or Appellate Department in the alternative pending adjudication of the Appeal on the merits and after full briefing on a complete record is authorized by Rule 11 of the Rules of this Court (Supreme Court).

The illustrative note contained in Rule 11 states:

> When notice of appeal to United States Supreme Court has been filed within the time prescribed, an appeal has been taken and district court thereafter is without jurisdiction---
>
> [emphasis added]

See, Schemgg v. School District, 184 F.Supp. 381, 3 FRD 2d 1034; Associated General Contractors v. Secretary of Commerce of United States, 459 F.Supp. 766, 77 FRD 3d 31 (1977 Cal. C.D).

The force of 28 U.S.C. Section 2104 is operative in the instant appeal and its effects can be assimilated to the present appeal. The pertinent section states in relevant portion that "an appeal to the Supreme Court from a state court judgment shall be taken in the same manner and under the same regulations and shall have the same effect as if the judgment and decree appealed from had been rendered in a court of the United States." [emphasis added.]

These provisions of the United States Code, taken in combination with the authorities cited hereinabove, together with the Supremacy Clause of the United States Constitution, constrain both state courts, e.g., Los Angeles Municipal Court and Los Angeles Superior Court Appellate Department, from acting while this Appeal is still pending in this Court and proscribe and prohibit the State of California from acting in any manner which would derogate from the jurisdiction of this Court.

Accordingly, this Court is compulsed to stay and suspend and/or vacate all further state action and proceedings pending a full adjudication of this Appeal.

WHEREFORE, Appellant, on the basis of the premises advanced herein--together with all those reasons more fully recited in the Jurisdictional Statement and Appendix--and supporting Declaration attached herewith, respectfully prays

that an Order issue forthwith from the entire court granting Appellant's Motion to Set Aside, Vacate, and Reverse the state judgment (the subject of this Appeal); that an Order further issue declaring the constitutional invalidity of the state statutes attacked in this Appeal, v.g., Penal Code Section 484 and Vehicle Code 10851 and 10855 for the reasons set forth in the Jurisdiction Statement attached herewith and further direct that Appellant be discharged from the onus of the void judgment and conviction forthwith and because of the despicable and irreversible constitutional injuries already inflicted upon Appellant, the State of California be prohibited and enjoined from carrying out a subsequent prosecution. Alternatively, should this Court not wish to act prior to full briefing and submission of the Appeal, Appellant demands this Court promptly issue an Order to the Los Angeles Municipal Court (Beverly Hills Judicial District, Division 5) and Los Angeles Superior Court (Appellate Department) commanding and directing that all proceedings be suspended and stayed or forthwith vacated pending a complete and full disposition of the instant appeal by the Court and pending further written order of this Court; and for such additional relief this Court deems necessary and proper in light of the gross constitutional injuries asserted and sustained by Appellant.

DATED: May 23, 1989

Respectfully submitted:

BY: _____
EUGENE JOHN CASELLA, ESQ.
Appellant

DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE JOHN CARELLA, declare and state as follows:

1. That I am the Appellant herein.

2. That on April 11, 1988 I filed a Notice of Appeal to the United States Supreme Court pursuant to 28 U.S.C. Section 1257(2) on the basis of the per se constitutional invalidity of the California state penal statutes as more fully appear in the Jurisdictional Statement and Appendix on file with this Court in the subject appeal and incorporated into this motion as EXHIBITS "B" and "C".

3. That the questions I presented in the Jurisdictional Statement filed with the Court on May 17, 1988 demonstrate a gross and egregious violation of Appellant's constitutional rights guaranteed by the Sixth and Fourteenth Amendments, and Article 1, Section 9 and Section 10, and other gross constitutional infirmities and aberrations requiring this Court redress and take jurisdiction.

4. That the subject Appeal has been duly docketed by the Clerk of this Court and is pending for review before this Court, and I have been so advised by a clerk of this Court of its docketing on May 19, 1988.

5. That in the Notice of Appeal I filed April 11, 1988, I specifically demanded that the Clerk of Court possessed of the trial record forthwith prepare the Clerk's Record and certify it forthwith to this Court in accordance with the Rules of this Court.

EXHIBIT "A"

6. That the Notice of Appeal I filed attacks the state statutes as being unconstitutional and divested the Los Angeles Municipal Court (Beverly Hills Judicial District) and Los Angeles Superior Court (Appellate Department) of all jurisdiction over the subject litigation (see Rule 11 and Schempp v. School District, 184 F.Supp. 381, 3 FRD 2d 1034 when it was filed on April 11, 1988.

7. That I was ordered to appear on April 12, 1988 by the trial judge Judith Stein and advised that my "failure to appear on said date pursuant to the court's order would result in a warrant of arrest being served upon you [appellant]."

8. That I was compelled to appear at the Los Angeles Municipal Court Beverly Hills Judicial District, Division 5, and to comply with the Order of the court, and advised the trial court that a Notice of Appeal was filed with the United States Supreme Court divesting that court of all jurisdiction.

9. That said trial judge (even though possessing no jurisdiction and under threat of arrest) continued the matter on the remittitur of the Los Angeles Superior Court (Appellate Department) until May 27, 1988 at 2:00 P.M. (PST).

10. That Rule 11 of the Rules of this Court and interpretative notes confirm that the trial court and appellate department were preempted of all jurisdiction over the subject litigation on April 11, 1988 and have no jurisdiction to execute upon the judgment or direct further proceedings until this Court completely and fully disposes of the substantial constitutional challenges raised by Appellant in this Appeal.

(See, also Associated General Contractors v. Secretary of Commerce, 459 F.Supp. 766, 77 FRD 3d 31 (1977 Cal. C.D.).

11. That I have also apprised this Court that the proceedings and prosecution carried out against me are not only predicated upon unconstitutional state statutes grossly offensive to Appellant's constitutional rights [see Jurisdictional Statement], but constitute a conscious and deliberate criminal and malicious abuse of criminal process and proceedings against me, carried out by the intelligence apparatus of the United States government.

12. That I further show this Court that the state statutes whose validity are attacked in this Appeal and the complained-of constitutional errors and infirmities engendered thereunder stand in flagrant contradiction and affront to this Court's mandates of In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.E. 2d 368 (1970); Sandstrom vs. Montana, 422 U.S. 510, 99 S.Ct. 2319, 53 L.Ed. 2d 281 (1977); Mullaney v. Williams, 421 U.S. 684, 45 S.Ct. 881, 44 L.Ed. 2d 508 (1975); Francis vs. Franklin, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985); Patterson vs. New York, 432 U.S. 197, 97 S.Ct. 2319, 5 L.E. 2d 281 (1977).

13. That I also show that my Sixth and Fourteenth Amendment rights have been irreparably injured and abridged by the aforereferenced criminal process invidiously commenced against me to destroy my livelihood, federal practice and reputation.

14. That I specifically invoke this Court's jurisdiction pursuant to 28 U.S.C. Section 2106 which states that:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order or require such further proceedings to be had "as may be just under the circumstances."

15. That I specifically commend to the Court's attention the broad jurisdiction conferred upon it by 28 U.S.C. Section 2106 and the complete and plenary jurisdiction conferred by such statute to criminal proceedings on appeal where there has been an egregious miscarriage of justice carried out against appellant, such as in the instant case. (See, Grosso v. United States, 390 U.S. 62, 19 L.Ed. 2d 906, 88 S.Ct. 709; Haynes v. United States, 390 U.S. 85, 19 L.Ed. 2d 923, 88 S.Ct. 722, United States v. Covington, 395 U.S. 5, 23 L.Ed. 2d 94, 98 S.Ct. 1559.)

16. That I further advise the Court that the plenary grant of jurisdiction conferred by 28 U.S.C. Section 2106 has been invoked by this Court to grant relief to an appellant not even requested by him in his appeal, where the relief was necessary in the interest of justice. (See, Forman v. United States, 361 U.S. 416, 4 L.Ed. 2d 412.)

17. That I state that in my reasoned and professionaly considered opinion and judgment, the constitutional questions I have presented in this Appeal will be disposed of and

concluded in a manner favorable to my cause and that this Court after careful and due deliberation will act to strike down and invalidate the state statutes challenged by me as unconstitutional on their face and the subject of this appeal.

18. That I will sustain further irreparable harm and injury if this Court permits the trial court to continue to carry forward with the void and malicious criminal proceedings against me in absence of all jurisdiction to do so, and the injuries to my person, livelihood, reputation, and the like already visited upon me will be further unnecessarily exacerbated and expanded.

19. That I have been subjected to the false misdemeanor criminal proceedings maliciously inspired against me and based upon constitutionally invalid state statutes for a period of three (3) years and I have been already falsely imprisoned for over sixty (60) days, pursuant to this false proceeding whose purpose, object and intent was to seek to discredit, smear and destroy my profession and background and integrity and to interfere with substantial litigations being prosecuted by me, which harm has already occurred.

20. That I complained to the State Bar of Colorado of which I have been a member since 1968, commencing back in 1980, of a concerted criminal interstate conspiracy directed against me and to the U. S. Department of Justice and Federal Bureau of Investigation, dating back to 1977 of a concerted criminal interstate racketeering conspiracy to destroy my federal practice because of my advocacies under various federal statutes and, particularly, the federal provisions of ERISA (Employee Retirement Income Security Act of 1974), and the

representation of various causes and clients before this Court and other federal forums.

21. That I am informed and thereupon state the subject false criminal proceedings and judgment now before this Court on appeal which pertain to a "rental car I received pursuant to a written rental contract" are an extension of, and relate to, the criminal interstate enterprise I commended to the U. S. Department of Justice and Federal Bureau of Investigation.

22. That I further state the statement of my personal livelihood and accomplishments attached herewith are true and correct statement of my professional livelihood and accreditation. (See EXHIBIT "A-1" attached herewith).

23. That I further state the subject proceedings instigated against me are false, vexatious, and calculated and designed to harm, oppress and disparage and discriminate against me and to collaterally disadvantage me and destroy my livelihood and profession and I specifically request that the Court act now to vacate, reverse, and set aside the false misdemeanor and judgment now before it on appeal and to invalidate the state statutes as unconstitutional and direct them to be stricken down.

24. That I specifically demand that this Court direct and order the trial transcripts of proceedings in Case No. M83675 be prepared by the Court Reporter and made a part of the Record on this Appeal and furnished to me at public expense.

25. That I specifically state the Transcripts completely "document" all the grounds for appeal presented (24 of them) presented to the Appellate Department of the Los Angeles Superior Court, and that I need the subject transcripts to vindicate all those issues raised by me on appeal before this Court.

26. That these vexatious proceedings now before this Court in combination with the aforereferenced conspiracy have "financially debilitated" me and I have been adjudged indigent by this Court. Accordingly, I am entitled to the Trial Transcripts as a matter of constitutional right and respectfully demand the transcripts be prepared, filed and furnished to me at public expense in their true and correct form. (See, In Re Armstrong, 126 C.A. 3d 565, 178 CR 902 (1981).

27. That I have been further advised that the trial judge and third parties acting in concert one with another are seeking to destroy, alter, and have spoiled the reporters notes and trial transcripts so as to cover up the criminal actions carried out against me by the intelligence community at the time of trial.

28. That I specifically invoke the Supremacy Clause of the United States Constitution as a bar and preemption of any further jurisdiction of the lower courts while this appeal is pending in this Court.

29. That I further believe and thereupon state the Administration has sought to cover up their criminal misconduct and undertakings and violations of my rights and person by falsely placing this entire proceeding under a "national security

blanket", thus depriving me of my constitutional rights to vindicate these heinous actions undertaken against me. I am the victim of a continuing federal crime and I demand this Court's intervention in having the crimes enjoined against me as it violates my federal constitutional and civil rights and my human rights in this country.

30. That I further state the United States Supreme Court [this Court] has obligatory jurisdiction to adjudicate the constitutional invalidity of the state statutes raised by me as Appellant in the aforereferenced appeal and the Court is required as a matter of law to decide the questions presented in this Appeal. (See, U.S. Ex Rel Wojtycha v. Hopkins, 517 F.2d 40 (1975).

I declare the foregoing is true and correct to the best of my knowledge and ability.

Executed on this 25 day of May 1988 in Los Angeles, California, under penalty of perjury.

BY: _____
EUGENE P. CARELLA, ESQ.

PROFESSIONAL AND EDUCATIONAL VITAE

ROBERT JOHN CABELLA

I. EDUCATIONAL ACHIEVEMENTS:

Elementary Education: High School

Darien High School, Darien, Connecticut.
Graduated 1961; Top 20%; Accepted for Study at Colgate University, University of Connecticut and Denison University; President of Student Council; National Leadership Conference; and Varsity Athletics.

College Education: Bachelor of Arts (B.A.)

Denison University, Granville, Ohio (1961 thru 1965)

Awarded Bachelor of Arts Degree (Political Science) - June 1965

Member: Phi Gamma Delta Social Fraternity.

Advanced Education: Doctor of Jurisprudence (J.D.)

University of Toledo School of Law (1965 thru 1968)
Awarded Juris Doctorate Degree (June 1968)

Licensed and Admitted to Practice Law:

State Supreme Court of Colorado (October 1968)
U. S. District Court of Colorado (October 1968)

II. VOCATIONAL EXPERIENCE: (Corporate and Business)

Mutual Life Insurance Company of New York (MONY)
Advanced Underwriting and Estate Planning Consultant (1968-1969): Primary technical, marketing, and consulting accountability for professional, business, and executive estate and insurance programs; Retirement and pension planning analysis; Advanced underwriting seminars (conducted at various locations throughout the country); Training responsibilities for MONY field underwriters (United States)

1740 Broadway, New York City, New York.

II. Continued --

U. S. Trust Company of New York
Financial Planning Consultant and Account Executive for Senior Executives of FORTUNE 500 Corporation (1969-1970): Primary consultant accountability for senior corporate executive clientele; direct corporate interface with senior executive echelon and development of comprehensive financial blueprints, including corporate-sponsored benefit programs and capital accumulation and estate conservation strategies for corporate executives.

45 Wall Street, New York City, New York.

Groesbeck Financial Advisors, Inc.
Senior Vice President of Corporation Division (1970-1973); Comprehensive, technical, marketing and consulting responsibilities for the financial planning requirements of senior corporate executives of FORTUNE 500 corporations. Managerial, supervisory and training responsibilities of technical and consulting support staff personnel (twenty (20) persons); accountability for the marketing, technical design and profitability of corporate financial services addressed to high-income corporate executives of FORTUNE 500 companies; monitoring of capital asset accumulation and estate strategies mandated by tax and investment changes.

1900 Avenue of the Stars, Century City
California 90067.

[redacted]. Hay Associates (1973-1974)
[redacted]ector of Marketing, Executive Financial Counselling [redacted]ervices: Exclusive and primary marketing; nationwide accountability for Edward N. Hay Associates executive financial counselling services designed to serve CEO's, presidents and other senior executives of FORTUNE 500 companies throughout the United States: Responsibilities for new market penetrations and business development.

Rittenhouse Square, Philadelphia, Pennsylvania.

II. Continued --

Inverness Planning Corporation (1974 thru 1976)
Vice President, Financial Planning Services - Corporate and Professional Executive Clientele): Direct consulting and marketing responsibilities for executive financial counselling programs and services to high-income corporate and professional executives; structuring and development of executive financial plans, including corporate-sponsored benefit programs (cash and non-cash); management incentive plans, investment plans (conventional portfolio and tax-advantaged plans); tax and estate conservation planning; liquidity analysis for high-income corporate and professional executives nationwide.

345 Park Avenue, New York City, New York

and

1880 Century Park East, Century City,
California 90067.

III. VOCATIONAL EXPERIENCE: (Legal and Professional)

Diversified, Independent Federal Legal Practice (1976-1988)

Federal Trial and Appellate Practice: Primary lead counsel and litigation responsibilities (trial, as well as appellate) for complex federal litigations under the Employee Retirement Income Security Act of 1974 (ERISA statute) and other labor and regulatory statutes); nationwide practice before various federal courts and federal administrative agencies; federal pension, labor, commercial, bad faith, malpractice and personal injury litigation expertise; sophisticated and extensive nationwide appellate skills and practice before various federal circuit courts in the United States and the U. S. Supreme Court; diversified and extensive trial preparation skills and considerable trial acumen in federal forums; preparation of appellate briefs, petitions and documents for various appellate courts and the U. S. Supreme Court.

IV. PERSONAL CHARACTERISTICS:

Distinguished professional acumen and expertise; strong and decisive professional and technical commitments; high personal integrity; intellectually decisive and accountable; positive client skills within executive

IV. PERSONAL CHARACTERISTIC (continued)

and professional societies; high intelligence quotient; self-motivated; confident and accepted at all professional and corporate echelons; outstanding written and verbal skills; high positive visibility within senior corporate and professional communities.

V. COMPENSATION BACKGROUND:

Prior to inception of independent legal practice in 1976, my compensation level was in the five figures plus incentive compensation and corporate perquisites (expense accounts, etc.) Current compensation is negotiable based upon the position, accountabilities and consideration of my extensive professional and business accomplishments, expertise and substantial legal and corporate experience and accomplishments.

VI. PROFESSIONAL ASSOCIATIONS, HONORS & MEMBERSHIPS:

A. Bar Memberships: (State and Federal)

State Supreme Court of Colorado
United States District Court of Colorado
United States Court of Appeals for the District of Columbia
United States Court of Appeals for the Fifth Circuit
Supreme Court of the United States
American Bar Association (past member for 12 years)
Association of Trial Lawyers of America
Practice in other federal trial and appellate forums in the United States.

B. Accreditations:

American Compensation Association (Honorary Member)
Presented Award of Distinction

Who's Who In American Law (Distinguished member)
(1987-1988, 5th Edition)

Who's Who In California (Distinguished member)
(1987-1988, 17th Edition)

VI. Continued --

B. Accreditations - continued

Who's Who In California (1988)
(Distinguished member)

International Platform Association (1988)
(Participating Member)

Who's Who In Emerging Leaders (1988)
(Selected Member)

Selected Delegate to the Dwight Eisenhower
Ambassador to Ambassador Program (1988)

Who's Who in the World, 9th Ed. (1988)
(Selected Member)

VII. REFERENCES UPON REQUEST:

Business, personal and professional references will be furnished upon request.

BY: _____
EUGENE JOHN CARELLA

P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

CERTIFICATE OF SERVICE

I, Eugene J. Carella, the undersigned, hereby certify and swear that on this 25th day of May 1998 I served a true and correct copy of the within MOTION TO VACATE, SET ASIDE, AND REVERSE JUDGMENT AND ALTERNATIVE RELIEF on all parties of record, interested persons, and Clerk of the Los Angeles Municipal Court, Beverly Hills Judicial District, and Clerk of the Los Angeles Superior Court Appellate Department, by first class mail, postage-prepaid, addressed as follows:

Ira Reiner
District Attorney
849 S. Broadway
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Los Angeles, CA 90012

John Van de Kamp
Attorney General
State of California
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San Francisco, CA 94102

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Los Angeles Superior Court
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Eugene J. Carella

Supreme Court U.S.
FILED
SEP 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

RESPONSE REQUESTED

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 87-6997

EUGENE JOHN CARELLA, APPELLANT

v.

PEOPLE OF THE STATE OF CALIFORNIA, APPELLEE

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT,
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

MOTION OF APPELLEE TO DISMISS

IRA REINER
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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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IN THE

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EUGENE JOHN CARELLA, APPELLANT

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PEOPLE OF THE STATE OF CALIFORNIA, APPELLEE

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

MOTION OF APPELLEE TO DISMISS

The appellee moves the Court to dismiss the appeal herein on the ground that it is manifest that the questions on which the decision of the cause depends are either so unsubstantial as not to need further argument or they have not been properly raised or passed upon. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari should be denied.

STATE STATUTES INVOLVED

The appeal is taken chiefly upon the ground that the appellate court had sustained the validity of two state statutes: California Penal Code section 484, subdivision (b) and California Vehicle Code section 10855.

California Penal Code section 484, subdivision (b) provides:

> Except as provided in Section 10855 of the Vehicle Code, intent to commit theft by fraud is presumed if one has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or

registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

Vehicle Code section 10855 provides:

Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

STATEMENT

This is an appeal from the judgment entered on February 3, 1988, by the Appellate Department of the Superior Court, State of California, County of Los Angeles (hereinafter referred to as "appellate court"), 1/ which affirmed appellant's conviction after a jury trial of the charge of having violated California Penal Code section 487, subdivision 3 (grand theft of an automobile). 2/

Appellant's prosecution and conviction of grand theft of an automobile was based upon his failure to return a vehicle leased by him on March 26, 1985 and to be returned by him by May 3, 1985. The vehicle was not recovered by the police until June 27, 1985, despite unsuccessful efforts by the lessor to

---

1. A copy of the Memorandum Judgment of February 3, 1988 is attached in the Appendix at App 1-3. A copy of the appellate court's Order Denying Defendant's Petition for Rehearing and Application for Transfer, filed on February 24, 1988, is attached in the Appendix at App 4.

We concede that the appellate department's judgment is a final judgment within the meaning of 28 USC § 1257. Defendant petitioned for rehearing and applied for transfer to the Court of Appeal of the State of California. (See Rules 61, 62, 107, California Rules of Court.) Such petition and application having been denied, the Appellate Department of the Superior Court of Los Angeles County becomes the highest court of the State.

2. This section, pertinent in relevant part: "Grand theft is theft committed in any of the following cases:. . . . 3. When the property taken is an automobile. . ." Section 489 provides: "Grand theft is punishable by imprisonment in the county jail for not more than one year or in the state prison." On April 8, 1988, the trial court suspended the imposition of sentence, placed appellant on formal probation which included that he serve six months in the county jail.

contact appellant about the vehicle. 3/ Appellant urged the unconstitutionality of the statutory presumptions contained in Penal Code section 484, subdivision (b) and Vehicle Code section 10855 at the trial court level. He also objected to two jury instructions embodying these statutory presumptions which were requested by the prosecution. 4/

One ground of appellant's appeal from his judgment of conviction was the "[trial] [c]ourt's refusal to dismiss the Complaint and declare the statutory presumptions contained in Section 10855 of Vehicle Code and 484 of the Penal Code unconstitutional, constitutes an abuse of discretion and reversible error." (App 6-7.) Appellant urged in the appellate court that the instructions embodying the statutory presumptions in question were unconstitutional. 5/ Appellant, although he did not expressly specify that the statutory presumptions and the jury instructions embodying them violated the Constitution of the United States, nevertheless cited People v. Hemmer, 19 Cal.App.3d 1052, 97 Cal.Rptr. 916 (1971) and People v. Hedrick, 105 Cal.App.3d 166, 164 Cal.Rptr. 169 (1980), and described them as expressly holding that the statutory presumptions in question violated the due process clause of the Fourteenth Amendment. (App

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3. The Settled Statement on Appeal, as approved by the trial court and reviewed by the appellate court, is included in the Appendix at App 5-13.

4. The jury instructions are included in the Appendix at App 72-108.
The first "presumption" instruction read: "Intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented." (App 105.) The second jury "presumption" instruction read: "Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be [illegible] vehicle." (App 106.)

5. Appellant's argument to the appellate court is contained in pages 23-25 of his brief, which is included in the Appendix at pages App 40-42. See also App 22-23, 25, 32, and 36 (numbered pages 5-6, 8, 15, and 19 of the brief) for other statements concerning the presumptions or instructions based on them. Appellant did not appear for oral argument before the appellate court. (See App 16.)

41-42 (pages 24-25 of Appellant's Opening Brief.) We assume that such argument satisfies the jurisdictional requirement of 28 USC § 1257 that a federal constitutional question has been properly raised. (STERN, GRESSMAN & SHAPIRO, SUPREME COURT PRACTICE (6th ed.) 153-155.)

The appellate court, although not expressly referring to the Federal Constitution, concluded that the jury instructions embodying the presumptions in Penal Code section 484, subdivision (b) and Vehicle Code section 10855 did not constitute error. (App 1-2.) We assume that the appellate court's holding satisfies the jurisdictional requirement of 28 USC § 1257 that the federal question purportedly raised by appellant was passed upon by that court. We also assume that the appellate court implicitly upheld the validity of these statutes under the Federal Constitution, and that the instant appeal properly lies with respect to the two statutes in question. (STERN, GRESSMAN & SHAPIRO, supra, at 158-160.)

Appellant's questions I, II, III, IV, V, and VII in the Jurisdictional Statement pertain to the statutory presumptions. The only issue raised, however, in the appellate court by appellant pertaining to the jury instructions embodying the statutory presumptions was that he was deprived of the right to have the jury resolve factual issues relating to all elements of the offenses charged. (App 40-42 (pages 23-25 of Appellant's Opening Brief).)

Question VI pertains to Vehicle Code section 10855 6/ and essentially contends that it is constitutionally void for vagueness with respect to the terms "owner" and the place or location to which the property is to be returned. The question was not properly raised or passed on in the court below. Hence, [illegible] requirement of 28 USC § 1257 has not been satisfied.

---

6. Appellant erroneously refers to section 10851. The text of Question VI, on page 3 of the Jurisdictional Statement, clearly indicates that appellant means section 10855.

Question number VIII, stated at page 3 of the Jurisdictional Statement, raises an issue concerning the impairment of the obligation of contracts which was never addressed to or by the appellate court. Hence, it pertains to a federal question not properly raised and, therefore, the jurisdictional requirement of 28 USC § 1257 has not been satisfied with respect to it.

Question number IX pertains to a claim that appellant's right to a speedy trial under the Fourteenth Amendment was violated. (See Jurisdictional Statement, at 4, 11-12.) One of the grounds of his appeal was that he had "never waived his right to a speedy trial at any time and no consent express or implied as defined in [California] Penal Code § 1382 exists in the record." (App 37 (page 20 of Appellant's Brief).) His argument on the matter is brief, does not purport either expressly or impliedly to rely upon federal constitutional grounds, and is based solely upon state statutory grounds. (App 44 (page 27 of Appellant's Opening Brief).) Moreover, the appellate court simply disposed of the issue by stating: "the [trial] court docket directly contradicts defendant's contention that he did not waive time on July 1, 1985. Thus, the record shows there was no violation of defendant's speedy trial rights." (App 2.) Clearly, the jurisdictional requirement of 28 USC § 1257 has not been satisfied with respect to the speedy trial issue.

Question number X of the Jurisdictional Statement pertains to a Fourteenth Amendment claim of error based upon a failure to accord appellant's right to a reporter's transcript of trial evidence. (Jurisdictional Statement, at 4-5. See also Id., at 23-25.) Whatever the merits of this claim, it was not presented to the appellate court by appellant in his brief. According to California law, a failure to brief an issue mentioned as a ground in a notice of appeal is deemed to have been abandoned. (People v. Tanner, 24 Cal.3d 514, 518 n. 2, 156 Cal.Rptr. 450, 596 P.2d 328 (1979).) Hence, the jurisdictional

requirement of 28 USC § 1257 as to this issue has not been satisfied. 7/

Question number XI in the Jurisdictional Statement pertains to appellant's claims based upon the failure of the trial and appellate court judges to disqualify themselves. (Jurisdictional Statement at 5. See also Id. at 15-16, 25-28.) Appellant's Brief recites some matter concerning disqualification of the trial and appellate court judges. (App 24-25, 37, and 44-45 (pages 7-8, 20, and 27-28 of Appellant's Brief).) His "argument" consists only of the caption: "THE TRIAL COURT'S REFUSAL TO ACT UPON APPELLANT'S DISQUALIFICATION PETITION CONSISTENT WITH LAW CONJOINED WITH PREJUDICE AND ANIMOSITY DIRECTED AT APPELLANT DENIED APPELLANT FAIR TRIAL GUARANTEED BY THE 14TH AMENDMENT." (App 44-45 (pages 27-28 of Appellant's Brief).) According to California law, where a point is merely asserted by counsel, without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion. (People v. Callegri, 154 Cal.App.3d 856, 865, 202 Cal.Rptr. 109 (1984). Hence, the jurisdictional requirement of 28 USC § 1257 with respect to this claim has not been satisfied. 8/

Question number XII of the Jurisdictional Statement pertains to the trial court's alleged refusals to grant appellant arraignment on misdemeanor sentencing, pre-sentencing probation

---

7. Appellant's Petition for Rehearing and Application for Transfer, which in included in the Appendix at App 47-81, sought rehearing or transfer upon the ground that he was deprived of the right to have a transcript of the proceedings in the trial court. However, nowhere did appellant base his claim, whether expressly or impliedly, upon federal constitutional grounds. Moreover, the appellate court's denial of the petition for rehearing and application for transfer did not address any federal question. (App 4.) It should be noted that the petition for rehearing and application for transfer in large part complains of the failure of the appellate court to grant appellant's motion for a transcript which was filed on January 20, 1988, some after briefing and oral argument.

8. The memorandum of points and authorities in support of appellant's Petition for Rehearing and Application for Transfer refers to a motion for disqualification of the judges of the appellate court on or after February 4, 1988. (App 65.) There is no federal constitutional question raised, expressly or impliedly, and the appellate court's denial did not address the issue.

report and hearing, and to permit appellant reasonable bail or release on his own recognizance pending appeal. (Jurisdictional Statement, 5-6. See also 22-23.) Appellant's Brief refers to this matter. (App 30-34 (pages 16-19 of Appellant's Brief.) His "arguments" on these issues are as follows:

"THE TRIAL COURT'S REFUSAL TO STAY JUDGMENT AND SENTENCING AND REMANDING APPELLANT FOR IMMEDIATE INCARCERATION, DESPITE DEMAND THAT JUDGMENT AND SENTENCING BE STAYED PENDING APPEAL VIOLATES THE SUPREME COURT MANDATE ANNOUNCED IN RE BAKKE. _____ 42 Cal.3d 84, and Appellant's Due Process Constitutional Guarantees" (App 44 (page 27 of his brief)); and "THE TRIAL COURT'S REFUSAL TO AFFORD APPELLANT A PRE-SENTENCING PROBATION REPORT, OR PROBATION HEARING, DESPITE DEMAND FOR SAME, DENIED APPELLANT EQUAL PROTECTION AND DUE PROCESS OF LAW." (App 45 (page 28 of brief.)

Here, appellant again failed to ground his claims upon the Federal Constitution. The appellate court's disposition of these issues do not refer to federal constitutional law. (App 2.) The jurisdictional requirements of 28 USC § 1257 are thus not satisfied with respect to Question number XII.

It is clear from the foregoing that the instant appeal arguably satisfies the jurisdictional requirement of 28 USC § 1257 only with respect to appellant's contentions concerning the statutory presumptions in California Penal Code section 484, subdivision (b) and Vehicle Code section 10855. Therefore, the appeal should be dismissed as to all other contentions.

ARGUMENT

Our position concerning appellant's contentions concerning the statutory presumptions in question are quite simple: (1) The a[illegible] finding no error insofar as the statutory presumptions are taken to be only presumptions affecting the burden of producing evidence. (2) Assuming that the trial court erred in giving the instructions

without indicating that the presumed intent is permissive, such error was harmless beyond a reasonable doubt.

1

THE STATE PRESUMPTION STATUTES ARE PER SE VALID

The appellate court declared that the presumptions embodied in the relevant statutes "are presumptions affecting the burden of producing evidence. (See People v. Hemmer (1971) 19 Cal.App.3d 1052, 1060-1062.) The effect of such presumptions, under Evidence Code section 604, is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence. (See People v. Hedrick (1980) 105 Cal.App.3d 166, 170.)" (App 1-2.) 9/ Such statutory presumptions are not violative of the Federal Constitution. As this Court declared in Ulster County Court v. Allen, 442 U.S. 140, 157 n.16, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979): "To the extent that a presumption imposes an extremely low burden of production - e.g., being satisfied by 'any' evidence - it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such." 10/ This Court has declared: "A permissive inference violates the Due Process Clause only if the

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9. California Evidence Code section 603 provides: "A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." Evidence Code section 604 provides: "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. This section shall be construed to prevent the drawing of any inference that may be appropriate."

10. But see this Court's remark in Francis v. Franklin, 471 U.S. 307, 314 n.3, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985): "We are not required to decide in this case whether a mandatory presumption that shifts only a burden of production to the defendant is consistent with the Due Process Clause, and we express no opinion on that question."

suggested conclusion is not one that reason and common sense justify in the light of the proven facts before the jury." (Francis v. Franklin, 471 U.S. at 314-315.) Hence, the appellate court did not err insofar as it is taken to have implicitly held that the two presumption statutes are valid under the Federal Constitution.

2

ANY INSTRUCTIONAL [illegible] CONCERNING PRESUMPTIONS WAS HARMLESS BEYOND A REASONABLE DOUBT

A determination that the two California statutes are constitutional does not, however, answer the question whether the trial court erred in instructing the jury with respect to the presumptions embodied in the statutes. The trial court instructions pertaining to the statutory presumptions did not advise the jury that the presumed fact may, but need not be, inferred from the predicate fact. Rather, the instructions state that the presumed fact is to be "presumed." (See note 4, supra.) However, the appellate court correctly concluded that appellant in the instant case "never offered testimony concerning the nonexistence of the presumed facts stated in Penal Code section 484 subdivision (b) and Vehicle Code section 10855." (App 2.)

As this Court teaches, the determination whether there has been instructional error "requires careful attention to the words actually spoken to the jury . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." (Sandstrom v. Montana, 442 U.S. 510, 514, 99 S.Ct. 2450, [illegible] Even though the California statutes only created presumptions pertaining to burdens of production of evidence, the jury instructions actually given, by virtue of the unexplained, unqualified use of the term "presumed," could well have induced jurors to have interpreted the presumption in more

stringent, impermissible ways. A reasonable jury could either have interpreted the presumptions as embodied in the instructions as conclusive or mandatory, or as mandatory rebuttable presumptions. (Id., at 516-517.) In either way, the jury would have been erroneously instructed since the prosecution would be therefore relieved of the burden of persuasion on an element of an offense. (Francis v. Franklin, 471 U.S. at 313-314.) 11/ The harmless-beyond-a-reasonable-doubt standard of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) is applicable to the instructional error committed in the instant case. (Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).) This Court "'plainly [has] the authority' to decide whether, on the facts of a particular case, a constitutional error was harmless under the Chapman standard," albeit this is to be done sparingly. (Id., 478 U.S. at 584.)

It is true that the appellate court has not ex professo applied Chapman to the facts of this case. However, it is evident that it would have concluded that the Chapman test was satisfied, assuming instructional error concerning the statutory presumptions in question. First, the appellate court concluded that "defendant never offered testimony concerning the nonexistence of the presumed facts stated in Penal Code section 484 subdivision (b) and Vehicle Code section 10855." (App 2.) In determining that there was no error in the trial court failing to give an instruction concerning a good faith belief or mistake of law or fact, the appellate court noted that "defendant offered no evidence to support the giving of such instructions." (Ibid.) That court also determined, contrary to appellant's contention, that "[o]ur review of the record convinces us that substantial evidence supports defendant's conviction." (Ibid.) Indeed, the

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11. We regret conceding error by the appellate court. However, in appellee's brief submitted to that court it was stated: "[T]he trial court erroneously instructed the jury with respect to the presumption because it failed to clearly indicate that the jury might have, but was not required, to infer the intent to commit theft by fraud." It was thereupon urged that instructional error was harmless beyond a reasonable doubt. (Respondent's Brief, 5.)

evidence of guilt is overwhelming, given the fact that appellant presented no evidence which would support a finding of the nonexistence of the presumed facts. The most salient evidentiary points compelling the inference of the requisite intent to steal are:

1. Appellant did not return the car on May 3, 1985, the due date, and it was not recovered by the police until June 27, 1985, following appellant's arrest.

2. There is no evidence that appellant ever contacted the rental agency after he extended the return of the car to May 3, 1985.

3. The rental agency sent registered letters respectively to appellant's business and home addresses listed on the rental agreement. The letter sent to the residence address was returned by the post office with the notation, "Moved with no forwarding address." The letter sent to the business address was not returned by the post office.

4. Numerous efforts by the rental agency owner to contact the appellant, in person or by telephone, were unsuccessful.

5. Appellant did not live at the address he had listed on the rental agreement as his residence, but rather at the place listed as his business. (App 9-11 (pages 5-7 of the Settled Statement on Appeal).)

Clearly, the appellate court's determination that no evidence was presented by appellant to negate the presumed intent indicates its implicit view that, had there been instructional error concerning the statutory presumptions, such error would have been harmless beyond a reasonable doubt.

Other than the instructional error committed with respect to the statutory presumptions, the jury was correctly instructed in every other respect.

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CONCLUSION

For the foregoing reasons, this Court should:

1. Dismiss the appeal with respect to Questions I, II, III, IV, V, and VII on the ground that these do not present substantial federal questions as to the validity of Penal Code section 484, subdivision (b) and Vehicle Code section 10855.

2. Treating the papers whereon the appeal was taken as a petition for writ of certiorari with respect to Questions I, II, III, IV, V and VII insofar as they are deemed to challenge the jury instructions embodying the statutory presumptions in question, certiorari should be denied because any instructional error was harmless beyond a reasonable doubt.

3. Dismiss the appeal with respect to Questions VI, VIII, IX, X, XI, and XII on the ground that the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on.

Respectfully submitted,

IRA REINER
District Attorney of
Los Angeles County

Harry B. Sondheim

HARRY B. SONDHEIM
Head, Appellate Division

Arnold T. Guminski

ARNOLD T. GUMINSKI
Deputy District Attorney

FILED

FEB 03 1982

FRANK S. ZOLIN, County Clerk

Alan Hardey

BY ALAN HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. EUGENE JOHN CARELLA, Defendant and Appellant.	Superior Ct. No.CRA24001 Municipal Court of the Beverly Hills Judicial District No. M83675 MEMORANDUM JUDGMENT

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is affirmed.

Defendant contends that the trial court erred in instructing the jury concerning the presumptions contained in Penal Code section 484 subdivision (b) and Vehicle Code section 10855. We do not agree. Both presumptions are presumptions affecting the burden of producing evidence. (See People v. Hemmer (1971) 19 Cal.App.3d 1052, 1060-1062.) The effect of such presumptions, under Evidence Code section 604, is to require the trier of fact to assume the existence of the

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presumed fact unless and until evidence is introduced which would support a finding of its nonexistence. (See People v. Hedrick (1980) 105 Cal.App.3d 166, 170.) Here, unlike the defendants in Benner and Hedrick, defendant never offered testimony concerning the nonexistence of the presumed facts stated in Penal Code section 484 subdivision (b) and Vehicle Code section 10855. We find no error.

Defendant next contends that the trial court erred by not giving an instruction concerning a good faith belief or mistake of law or fact. However, defendant offered no evidence to support the giving of such instructions. Again, there was no error. (People v. Vineberg (1981) 125 Cal.App.3d 127, 138.)

Next, the court docket directly contradicts defendant's contention that he did not waive time on July 1, 1985. Thus, the record shows there was no violation of defendant's speedy trial rights.

Defendant contends that the court was required to stay judgment and sentencing pending defendant's appeal. The record, however, shows that the trial court set bail for defendant pending his appeal. Such was all that was required. (Pen. Code, § 1272(2).)

Defendant next claims that the trial court erred by not obtaining a pre-sentencing probation report before sentencing defendant. The trial court had no mandatory duty to do so. (Pen. Code, § 1203(d).)

Our review of the record convinces us that substantial evidence supports defendant's conviction. (People v. Johnson (1980) 26 Cal.3d 557, 562.)

76T576T- PS 12-84

We need not address defendant's remaining contention. (Cal. Rules of Court, rule 105(c); see People v. Merrien (1967) 66 Cal.2d 390, 397.) We observe, however, in our review, no evidence to support appellant's contention.

Presiding Judge

We concur.

Judge

Judge

FILED

FEB 24 1988

FRANK S. ALLEN, County Clerk

Alan Hardey

BY ALAN HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. EUGENE JOHN CARELLA, Defendant and Appellant.	Superior Ct. No.CR A24001 Municipal Court of the Beverly Hills Judicial District No. M 83675 ORDER DENYING DEFENDANT'S PETITION FOR REHEARING AND APPLICATION FOR TRANSFER

THE COURT*

The above petition and application having been made, submitted and duly considered,

Said petition and application are denied.

IT IS FURTHER ORDERED that all other demands included in the above petition and application are denied.

Margolis MAR Woods

*Before Margolis, P.J., Roberson, J., and Woods, J.

vm10

FILED
AUG14 1987
S. M. SEIDLER, Clerk Municipal Court
Beverly Hills Judicial District
By _____ Deputy

IRA REINER
DISTRICT ATTORNEY
BY: GREGORY ALARCON
DEPUTY DISTRICT ATTORNEY
1725 Main Street, Room 228
Santa Monica, California 90401
(213) 458-5376

Attorney for Plaintiff

FILED
AUG 25 1987
FRANK S. ZOLIN, COUNTY CLERK
BY S. MURPHY, DEPUTY

MUNICIPAL COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

BEVERLY HILLS JUDICIAL DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

[redacted],

Defendant(s).

NO. MB3675
CAA 24081

PROPOSED SETTLED STATEMENT ON APPEAL; PARTICULARIZED GROUNDS ON APPEAL

Appellant appeals from a misdemeanor conviction of Grand Theft Automobile following a jury trial. Appellant originally filed a proposed settled statement. The People filed a response to the proposed settled statement. In December 1986, on the date of the settling of the statement, Appellant failed to appear.

The Court accepted the People's statement of facts as the settled statement.

Appellant filed an objection to the settled statement. The Appellate Department of the Superior Court remanded the settled statements by the trial court because grounds of appeal were missing and specific portions of record

were not referred to.

Appellant failed to appear on June 12, 1987, the date of the new settling of the statements on appeal. The Court ordered a warrant for appellant's arrest, setting the bail at $10,000.

A new date of August 12, 1987 has been set for a settling of the statement of appeal. Defendant failed to appear.

It should be noted that it is the appellant who is appealing, not the People. Therefore, the grounds of appeal would not be supplied by the People. However, since it is unclear whether Appelant will appear at the hearing on August 12, 1987, the People will include in this proposed statement on appeal, in its entirety the grounds which appellant initially provided. Since these are appellant's grounds of appeal, the People cannot supplement them in any way.

The following is the appellant's grounds on appeal taken from his original proposed statement on appeal.

GROUNDS ON APPEAL

1. Appellant's right to a speedy trial guaranteed by state and federal constitutions was grossly abridged by the Court's denial of Appellant's Motion for Mandatory Dismissal pursuant to Section 1382 of the Penal Code, and said denial constitutes reversible error.

2. The trial court's failure to stand recused and disqualified in accordance with Appellant's Disqualification Petition and its failure to permit Petition to be filed or lodged constitutes reversible error.

3. Trial court's extreme and gross bias and hatred against Appellant and in favor of the People—including threats of oppression, incarceration and punitive fines—deprived Appellant his right to receive a fair trial and other Constitutional rights.

4. Court's refusal to dismiss the Complaint and declare the statutory presumptions contained in Section 10855 of Vehicle Code and 484

of the Penal Code unconstitutional, constitutes an abuse of discretion and reversible error.

5. Trial court's refusal and failure to instruct the jury in accordance with Appellant's Written Jury Instructions and Charges filed by Appellant on March 18, 1986 and its failure to make any sua sponte instructions regarding Appellant's defense that "legal title and permission to the subject vehicle was entrusted to him pursuant to written contract" constitutes infirming reversible error.

6. Trial court's instruction to the jury over Appellant's continuing objection with respect to the presumptions contained in Vehicle Code Section 10855 and Penal Code Section 484, deprived Appellant of his Constitutional rights to a jury trial and fair trial and otherwise constitutes fatal reversible error.

7. Trial court's refusal to admonish and prohibit the prosecution for its misconduct in presenting prejudicial charts and graphs not in evidence to the jury and prosecutor's reference to such documents through the course of the trial and other prosecutorial misconduct constitutes infirming reversible error and denied Appellant's right to a fair trial.

8. Trial court's failure to grant Appellant's Motion to Dismiss on the grounds that the subject criminal proceeding is a prosecution for a "civil debt," for enforcement of a "civil contract," constitutes reversible error.

9. The court's refusal to dismiss the complaint on the grounds that the statutes in question are void for vagueness and ambiguity thereby denying Appellant his due process rights constituting reversible error.

10. Trial court's refusal to grant Appellant's Motion to Dismiss at close of People's case on the basis of insufficient evidence constitutes reversible error.

11. Trial court's refusal to grant Appellant's Motion for Mistrial and for Motion for Judgment Notwithstanding the Verdict constitutes prejudical, reversible error and gross abuse of discretion.

12. Trial court's refusal to strike People's Jury Instructions or to Accord Appellant Hearing on Jury Instructions constituted prejudicial reversible error and abuse of discretion.

13. Trial court's refusal to grant Appellant a Probation Hearing and accord him a Pre-Sentencing Report after it had set the matter for probationary hearing on May 13, 1986 — together with arbitrary and capricious pre-sentencing conditions and revocation of Appellant's own recognizance status and placing him under excessive bail and physical danger constituted a denial of due process of law and is reversible error.

14. Trial court's denial of Appellant's Motion for Judgment in Arrest of Proceedings for Fraud and Trial Irregularities, including jury tampering and constituted reversible error.

15. Court's failure to properly arraign Appellant on the subject charges— together with the failure of the Court to properly discharge its duties to Appellant at arraignment of sentencing and judgment denied Appellant his right to a fair trial.

16. Trial court's refusal to permit inquiry and questioning by Appellant into juror pool and the undue voir dire restriction into bias and conflict of interests of jurors constitutes infirming reversible error.

17. The trial court ex parte, in collusion with The People, conspired to fix the jury pool and jurors assigned to the case, and the jury verdict entered on March 24, 1986 was secured by fraud, trickery, deceit and conspiracy between the trial court and the People and various jurors and alternate jurors.

18. The verdict of the jury entered on March 26, 1986 is

unsupported by any evidence and was the product of a common enterprise to harm Appellant irreparably and his reputation and livelihood and secured by fraud.

19. The trial court's denial of Appellant's Motion For a New Trial constituted infirming reversible error.

20. The trial court's failure to admit Appellant's evidentiary exhibits and/or Take Mandatory Judicial Notice of Legal Proceedings in which Appellant was participating in California and other forums constituted infirming reversible error.

21. Trial court's refusal to to Strike People's Evidentiary Exhibits that were NOT properly authenticated constituted infirming reversible error and should have been suppressed.

22. The trial court's imposition of sentencing Appellant to six (6) months in County Jail with no probation—together with three (3) years of parole—is a cruel, unusual punishment and in excess of the statute and unconstitutional, and must be vacated forthwith, especially in light of the fraud associated with the subject sentencing to prevent Appellant from prosecuting other matters as an attorney and/or plaintiff.

23. For such further grounds as appear from the transcript of evidence and/or proposed statement filed herein, including but not limited to, the fact that the subject arrest and consequent proceedings were a fraud, nullity and carried out in total absence of any probably cause and trial court's refusal to dismiss proceedings were in concert with third parties to harm and falsely imprison Appellant.

The following is the People's proposed statement on appeal which has been certified by the court as the settled statement on appeal:

On March 25, 1985, EUGENE JOHN CARELLA rented a car from MRG Car

Rental, located in Beverly Hills, from Jessica Patricio. The rental agreement was for 30 days. The agreement signed by Appellant included in it the legal obligation to return the automobile on the agreed date. The next day on March 26, 1985, Appellant exchanged the car for another and signed an agreement to return the car on April 26, 1985.

Appellant extended by telephone the rental agreement until May 3, 1985. Appellant did not return the car on May 3, 1985. The owner of MEG, Galil Yaacov, telephoned Appellant numerous times. He even went to the location listed as Appellant's business but was never able to contact Appellant. It was discovered that Appellant did not live at the address he listed on the rental agreement as his residence. Appellant actually resided at the address which he listed on the rental agreement as his business.

Appellant never returned any of the phone messages left by MEG or Yaacov. Mr. Yaacov sent registered letters to both addresses listed by Appellant on the rental agreement. The letter addressed to the location listed as his residence on the rental agreement was returned by the post office as stating on the letter, "Moved with no forwarding address." The demand letter sent to the address left by Appellant as his business address on the rental agreement was not returned by the post office.

Mr. Yaacov continued to telephone Appellant at the number left as his business but later found to be a hotel. His calls were not returned. Mr. Yaacov asked the person taking the messages, the hotel clerk, if Appellant was receiving the messages that he was sending. The clerk stated that Appellant was receiving the messages. The registered letter dated May 16, 1985, demanded the immediate return of the car or the matter would be turned over to the police.

On June 3, 1985, Mr. Yaacov reported the theft of the car to the

Beverly Hills Police Department. Beverly Hills Detective Schwab left messages to Appellant but they were not returned. An arrest warrant was obtained and on June 27, 1985, Appellant was arrested and the car was recovered in the adjoining parking lot of the address which Appellant listed as his business address.

The car had an excessive amount of mileage on it from the date rented. The brakes were worn down so low that they needed replacement. The car also had minor dents around the body. At no time did Appellant ever contact the MPG rental office after he extended the return of the car rented car to May 3, 1985. Appellant never paid for the use of the car other than the initial $400 deposit.

Two witnesses testified for the defense. The first was Appellant's fiancee. She testified that at the time of the [illegible] with Appellant at the address he listed on the rental application as the business address. She testified that she didn't remember receiving any messages to return the rented car, although she normally left the "message gathering" duties to Appellant.

She testified that on a Saturday, May 11, 1985, she remembers going to a gas station to fill up the rented car with gas, accompanied by Appellant. It was in the evening hours and close to the MPG rental office.

She knew that Appellant has a large amount of cash on him at the time. She did not know what he was going to do with the money. She stated that she normally rode the bus and not in Appellant's rented car. She knew nothing of the rental agreement. She believed there was a conspiracy against Appellant and herself which involved the Central Intelligence Agency and the Beverly Hills Police Department.

The second witness to testify for the defense was Jennifer Ayres who was employed as a cadet at the Beverly Hills Police Department. She stated

that as a part of her duties, she would occasionally answer the telephone. She said that she did work on June 3, 1985 and that she had no memory of whether Appellant telephoned Detective Schwab.

After a jury trial, Appellant was convicted of Grand Theft Auto as a misdemeanor, Penal Code Section 487(2) and acquitted of Unlawful Taking of a Vehicle, Vehicle Code Section 10851. Appellant was sentenced to six months of county jail and three years formal probation.

Respectfully submitted
IRA REINER
District Attorney of
Los Angeles County

By

Helen Wojnak for

Deputy District Attorney

Attorney(s) for

JUDGE'S CERTIFICATION

IN THE MUNICIPAL COURT OF BEVERLY HILLS JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA
9355 Burton Way, Beverly Hills, Calif. 90210

Case Number M83675

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff(s) vs. EUGENE CARELLA, Defendant(s)

The Court does now settle and allow the [illegible] Statement on Appeal and certifies that the same are true and correct statements of the proceedings had in the above entitled action.

Dated: AUG 17 1967

Judge of the Municipal Court of Beverly Hills Judicial District

MISCELLANEOUS PURPOSE FORM

FILED

OCT 27 1987

FRANK S. ZOLIN, County Clerk

Alan Hardey

BY ALAN HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. EUGENE JOHN CARELLA,	Superior Ct. No.CR A24001 Municipal Court of the Beverly Hills Judicial Dist. No. M 83675 ORDER DENYING APPLICATION FOR ORDER VACATING BRIEFING SCHEDULE, MOTION TO STRIKE SETTLED STATEMENT AND APPLICATION FOR WRIT

THE COURT*

Defendant's application for order vacating this court's briefing schedule, motion to strike the settled statement and application for writ having been filed and having been duly considered,

Said applications and motion are hereby denied.

The time for filing briefs is reset as follows:

*Before Cooperman, P.J., Soven, J., and Newman, J.

vm8

Appellant's Opening Brief - November 16, 1987

Respondent's Brief - December 7, 1987

Appellant's Reply Brief - December 17, 1987

APPELLANT WILL BE GRANTED NO FURTHER EXTENSIONS WITHIN TO FILE HIS BRIEF. IF SAID BRIEF IS NOT FILED BY 3:00 P.M. ON THE AFORESAID DATE, THE APPEAL WILL BE DISMISSED FORTHWITE.

76T576T- PS 3-83

STATE OF CALIFORNIA

MARGOLIS, Presiding Judge
NEWMAN, Acting Presiding Judge
ROBERTSON, Judge
WOODS, Judge

Date THURSDAY, JANUARY 28,1988
B.J. SCHNEIDER, Deputy Clerk
ALFORD Deputy Sheriff
9:00 a.m.
Page 1

CR A 24001 Mun. Ct. Beverly Hills (MRW) — 1

PEOPLE, etc., - A.T. Guminski,D.D.A., Plff. & Resp.,
vs
EUGENE JOHN CARELLA, - Pro Per, Defc. & Applt. — 0

Merits (STEIN - J)

Orally argued ( ) Submitted ⋈ On Briefs ⋈ Oral argument waived by Appellant in open court ( ) by phone ( ); Respondent in open court ⋈ by phone ( )

OTHER:

Post Hearing Notes

CR A 24408 Mun. Ct. Inglewood (NMW) — 2

PEOPLE, etc., - A.M. Burger, Sr.D.C.A., — 0
Plff. & Resp.,
vs
LALU MAHESH PRASAD, - M.H. Ehrlich, Deft. & Applt.

Merits (ROBINSON,JR., - J)

Orally argued ⋈ Submitted ⋈ On Briefs ( ) Oral argument waived by Appellant in open court ( ) by phone ( ); Respondent in open court ( ) by phone ⋈

OTHER:

Post Hearing Notes

CR A 24515 Mun. Ct. Los Angeles (WNR) — 3

PEOPLE, etc.,- J.G. Bogigian,D.C.A., Plff. & Resp.
vs
NORMAN GORDON PAGE, - A. VonSonn, Deft. & Applt. — 0

Merits (DUNN - J)

Orally argued ( ) Submitted ⋈ On Briefs ⋈ Oral argument waived by Appellant in open court ( ) by phone ( ); Respondent in open court ⋈ by phone ( )

OTHER:

Post Hearing Notes

THE ... OF ... AT ... SEP 20 1988
FR ...
BY M. P. Kimbrough

NOV 17 1987

11/18/87

IN THE APPELLATE DEPARTMENT

OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

EUGENE JOHN CARELLA, Appellant vs. PEOPLE OF STATE OF CALIFORNIA, Appellee	APPEAL NO. CRA 24001

FILED

NOV 18 1987

ON APPEAL FROM LOS ANGELES MUNICIPAL COURT

BEVERLY HILLS JUDICIAL DISTRICT

APPELLANT BRIEF

EUGENE JOHN CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, California 90067-0292

Appellant

I.

STATEMENT OF CASE

A. Pre-Trial Proceedings.

In the early morning of June 27, 1985, Appellant, Eugene John Carella, a nationally-recognized attorney specializing in federal litigations and appellate work, and, in particular ERISA litigation, residing in Los Angeles, California, was falsely arrested at his residence in Westwood, California, by Beverly Hills detectives Schwab (a former rental agency car owner) and a Doe detective. At the time of the subject false arrest while appellant was asleep in his apartment, said detectives threatned appellant and [illegible] with an automatic weapon which said detectives later placed at appellant's head stating "they would blow appellant's brains out if he spoke."

Appellant was falsely arrested for alleged violations of § 10851 of the Vehicle Code and § 484 of the Penal Code with respect to the subject rental vehicle furnished to him pursuant to a written contract. A two-count misdemeanor complaint was filed by the District Attorney for the County of Los Angeles and the proceedings denominated as Los Angeles Municipal Court No. M 83675 were commenced on June 27, 1985 against appellant.

Appellant was brought before John Murphy who unbenounced to appellant, was a commissioner of said court, and not a

judge. At no point in time from June 27, 1985 up and to the time that appellant learned of the status of said John Murphy as a commissioner and moved for his recusal was appellant ever apprised by the court of his status, nor did appellant ever consent to said commissioner, nor did he ever make an intelligent waiver of his right to be arraigned or otherwise have his trial presided over by a judge of the municipal court.

The false criminal charges instigated against appellant emanated from a written rental automobile contract furnished to appellant which defined and controlled the relationship of the parties, including the rental car company, which, in fact, was MPG Car Rental (not the legal owner or registered owner). The charging allegations recited the legal owner of the vehicle to be Ciero and Ciera Car Rental (Sierra). Appellant was not furnished with a written copy of the subject complaint despite a specific demand by him until on or about December 2, 1985.

On June 27, 1985, appellant refused to waive his right to a speedy trial and the matter was continued to July 1, 1985 by the then acting commissioner and continued again to August 9, 1985, and again to October 20, 1985. At no point in time did the commissioner or the district attorney or any other judicial person ever advise appellant of his specific

constitutional rights with respect to a speedy arraignment or speedy trial, nor did they ever advise appellant of the specific consequences of making any waiver of his rights to a speedy trial or otherwise secure the statutory consent of appellant to waive said rights. At no point in time did appellant waive his right to a speedy trial.

On October 20, 1985, appellant moved to dismiss the subject false charges relating to the interpretation of a "civil rental contract" on the grounds that he had not been brought to trial timely, had not been accorded a probable cause hearing though in custody at the time of his "arraignment" and that the provisions of § 1382 of the Penal Code were mandatory, [illegible] and that the commissioner was compulsed to dismiss the false charges at once and to cease and desist in further conduct of the litigation. Appellant further advised the trial court that the proceedings were in total want of probable cause, malicious and vexatious in nature, and carried out for purposes of harming appellant in his person, property and livelihood.

Appellant renewed his motion again on December 2, 1985 for a mandatory dismissal and also specifically inquired as to whether John Murphy was a judge as indicated on the daily trial calendar posted on his courtroom door, inasmuch as appellant never consented to the jurisdiction of a commissioner. It

was at this point in time that John Murphy first made a disclosure that he was a commissioner (after he had denied appellant's § 1382 motion to dismiss). Appellant forthwith moved for recusal and the cause was then reassigned by said commissioner to visiting judge R. Reynolds, sitting in Division 5. Upon learning from appellant that he had not received a written copy of the complaint filed against him, said Judge Reynolds furnished appellant with a copy of the complaint and further advised him in open court that Ciero Rental Car was listed as the legal owner of the subject rental vehicle as recited in the complaint, notwithstanding that appellant had rented the subject vehicle from MPG Car Rental, and this disclosure by the court totally surprised and astounded appellant.

On December 16, 1985, the matter came on in Division 5 again at which time appellant renewed his motion to dismiss the subject proceedings for failure to accord him a speedy trial and because of the bogus chargaes and that there was no probable cause or probable cause hearing extended to appellant despite his demand for same while in custody at the time of his "arraignment." Appellant's motions were denied.

On January 13, 1986, a subsequent visiting judge from Northern California, identified as Judge Morse, presiding over the cause in Division 5 without prior notice to appellant, threatened, intimidated and sought to silence appellant in

his attempts to have the subject charges dismissed against him pursuant to § 1382 of the Penal Code and to declare a mistrial, inasmuch as no court despite their constitutional requirement to do so, had specifically made a detailed reading of the charges brought against appellant, or the consequences that would attach in the event that appellant were to waive any of the constitutional rights afford him under the state and federal constitution. Appellant's motion was denied and his request for continuance to seek a writ with the Appellate Department of the Superior Court was also denied. This notwithstanding tne absence of any evidence whatsoever that the court had made the proper instructions to appellant regarding his constitutional rights or the effect of waiving same.

On March 7, 1986, pursuant to written motion set for hearing on that day in Division 2 of the Municipal Court, appellant moved to dismiss the subject complaint on the grounds that the statutory presumptions contained in Vehicle Code § 10855 and Penal Code Section 484, et seq., were unconstitutional, that the subject statutes were void for vagueness and ambiguity, that the subject criminal prosecution was a prosecution for a "civil debt" involving substantial questions of contractual interpretation properly the subject of civil dispute and contract grievance resolution procedures and that the presumptions improperly and unconstitutionally deprived appellant of having each and every element of the case heard before the jury and

intruded upon the jury function, and were arbitrary and caprcious. Said motion was denied without prejudice to it being renewed subsequently.

B. Trial Proceedings.

On March 17, 1986, the matter came on for jury trial and jury selection. During voir dire appellant vigorously sought to challenge the juror list and juror pool from whence the jurors were selected. The trial court sitting as Judith O. Stein, who was assigned to the proceedings without prior notice to appellant, adamantly abridged and obstructed appellant's efforts. Appellant's right to ask prospective jurors questions pertinent to the proper and fair discharge of their functions as jurors, including conflicts of interest questions, associations, prior awareness or knowledge by them of appellant or the subject cause was strenuously foreclosed by the trial court and deprived appellant of his right to select jurors who would accord him a fair and impartial trial. During the voir dire process on March 17, said Judith O. Stein exhibited gross and extreme bias and hostility and ill will toward appellant of such a magnitude and proportion as to lead a reasonable disinterested third person to conclude that she could not accord appellant a fair trial and that her actions toward appellant in view of the jurors had unduly prejudiced and would continue to prejudice appellant and deprive him of his right to receive

a fair and impartial trial by jury.

On March 18, 1986, appellant forthwith moved for the "immediate disqualification" for cause in writing of said Judith O. Stein on several grounds -- and, in particular, that she had ex parte communications with the District Attorney and other third persons gained outside of the courtroom and had acted in concert with said third parties to grossly harm appellant and his right to have a fair and impartial trial. The trial judge prevented appellant from filing the subject disqualification petition and/or lodging said document with the Clerk of the court and appellant specifically designates said Motion for Disqualification sought to be filed and/or lodged by him. The Disqualification Petition sought to have Judge Stein cease and desist from all further conduct in the trial proceedings and to have the disqualification motion heard and adjudicated in accordance with the proper legal procedures for same. In short, he trial court not only prevented appellant from his timely and efficacious challenge to her and his right to receive a fair trial, but she retaliated by maliciously and malevolently preventing appellant from speaking or otherwise carrying forward with his defense by placing him into contempt, removing him from the courtroom and incarcerating him and imposirg monetary fines and penalties without cause and to impede the presentation of his defense. The bias and disparagement by the trial court was done in

the presence of the jurors and done to irreparably taint appellant and otherwise prejudiced him in the eyes of the jurors.

On March 18, 1986, appellant filed his request to charge the jury (jury instructions) and made specific requests upon the trial court to refrain from giving any instructions as to the presumptions contained in § 10855 of the Vehicle Code or § 484 of the Vehicle Code as the instruction by her on these presumptions constituted infirming reversible error, deprived appellant of his right to have the jury decide all elements of the alleged offenses, and otherwise prevented him a fair trial. Appellant also specifically requested an oral hearing on the jury instructions to ensure that the court [illegible] as to the presumptions, as to do so would be per se error, and to otherwise ensure that the court would instruct specifically and affirmatively the jury as to the requested defenses of appellant concerning the good faith mistake of fact and good faith belief and appellant's legal right and title to the subject vehicle conferred pursuant to the terms and provisions of the automobile rental contract and agreement by which the vehicle was furnished to appellant and other specific intent instructions.

That the trial court specifically refused to grant appellant any hearing, and otherwise refused to give the affirmative instructions referenced above despite her absolute requirement

to do so existing in all prosecutions of this type and further compounded the harm by then instructing the jurors as to the statutory presumptions contained in the aforereferenced sections over the objection of appellant.

The People's evidence consisted of three witnesses--two employees of MPG Car Rental who furnished the jury with conflicting, perjured statements concerning the facts and events relating to the subject transactions and a Detective Schwab of the Beverly Hills Police Department, a former Budget Rental Car franchise owner/agent, who sought to use the police powers to enforce a civil contract.

The testimony of the People's witnesses, together with their documentary evidence, showed that they had sent a certified letter to appellant which was not received by him, and they did not produce any evidence that appellant had received any written communication or other communication whatsoever concerning the subject vehicle. Further, all of the People's witnesses testified that despite the fact that they knew appellant lived a little more than one mile from the rental office where the vehicle was rented in Beverly Hills that not one of them came by to his apartment and left a note at his door, or otherwise seek to personally visit with him or to check on the subject vehicle which was parked in appellant's garage every night.

The People's evidence was also deficient in that there were discrepancies in the lack of authentication as to which rental vehicle contract was in effect and otherwise controlled the contractual relationships of the parties and the knowledge of the respective MPG Car Rental people as to the specific amounts of monies that appellant furnished to the rental car company when he was furnished the subject vehicle. The People's evidence was also conflicting and equivocal as to who was the legal owner of the subject rental vehicle.

Further, all of the People's witnesses testified that none of them ever made a written demand for additional monies owned purportedly pursuant to the contract on appellant. Further, [illegible] the subject rental vehicle to appellant with their permission and consent and that at no point in time was that permission and consent revoked with the knowledge of appellant.

The prosecution represented by Deputy District Attorney Alarcon committed gross and prejudicial prosecutorial misconduct throughout the entire trial proceedings. In addition to derogatory and personal disparagement of appellant, said district attorney conducted numerous ex parte communications with the trial court in an attempt to fix the juror pool and to prejudice the appellant in light of the jury's eyes. Additionally, the prosecution commencing with his opening statement put

before the jurors written documents, charts and graphs without any evidentiary support, foundation, and without otherwise being corroborated which grossly misrepresented the factual circumstances concerning the transactions -- all to the prejudice and detriment of appellant and over his continuing objections to strike said documents from being shown to the jurors or permitting the prosecution to refer to said documents as though they were evidence. All of the motions made by appellant to strike and the concommitant motion for a mistrial for prosecutorial misconduct were also denied by the trial court.

Appellant's motion to dismiss the proceedings at the close of the People's case on the basis of insufficient evidence [illegible] malicious prosecution, and on the basis that the statute sued upon by the People were constitutionally defective and void for vagueness were all denied by the trial court on or about March 19, 1986.

Appellant's defense was grossly stunted and irreparably prejudiced by the disparaging and prejudicial remarks made by the trial court in front of the jury and the continuing use of threats of contempt, fines and incarceration by the trial court with the express purpose of interfering with appellant's defense. Appellant produced evidence at the time of trial by direct testimony that he had been physically in Westwood in the Los Angeles area each and every day and night during

the subject period in question and had been actively involved as an attorney and/or litigant in numerous legal proceedings located in the Superior Court for the County of Los Angeles, Central District, and U. S. District Court for the Central District of California during the periods in time in question, and material to the defense that appellant had absolutely no intent to "embezzle or unlawfully take a rental vehicle" which he had received "pursuant to a written contract, vesting permission and authorization in him." In particular, appellant respectfully demanded that the trial court take judicial notice mandatory pursuant to the Evidence Code of appellant's attendance on June 17, 1985 at the U. S. District Court located at 312 No. Spring Street, where he was seeking attorneys fees owned [illegible] in the amount of $140,000+; a proceeding where appellant attended before a retired judge acting as a referee in a Superior Court litigation on June 20, 1985 at 3255 Wilshire Boulevard in Los Angeles; judicial notice of an EEOC complaint filed at the federal office on or about June 21, 1985 wherein appellant had brought a discrimination claim where his employer had unjustificably terminated his contract valued at $100,000+ without cause and in bad faith; an appearance at Santa Monica Municipal Court on June 21, 1985 to satisfy a traffic citation issued on June 6, 1985 -- as well as other proceedings within two (2) weeks of the subject false arrest of appellant on June 27, 1985. The trial

court denied all of the demands of appellant to take judicial notice or to enable appellant to file documents of these proceedings, severely injuring and prejudicing his defense and his motion for a new trial.

Appellant also produced evidence by his fiancee that she had accompanied him on May 11, 1985 to the offices of MPG Car Rental located approximately one mile from appellant's residence in Beverly Hills and that she was aware that appellant had cash monies on him and had actually gone to the offices of MPG Car Rental but said office was closed, or there was no agent on duty, whereupon appellant secured gas at the Union Station contiguous with the MPG Car Rental located at Doheny [illegible] and dated May 11, 1985 which appellant sought to move into evidence after it was corroborated by his witness as being a true and correct receipt. The trial court suppressed the document from evidence which appellant specifically incorporates into this statement and otherwise prevented the witness from testifying as to her knowledge as to the events in question on May 11, 1985 when appellant was physically at the rental offices of MPG Car Rental in Beverly Hills.

Appellant also produced evidence from a Jennifer Ayers of the Beverly Hills Police Department that she was, in fact, on duty on or about June 5, 1985 when appellant called, returning Detective Schwab's call on June 3, 1985, and when she advised

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and his cause in their eyes, and because there is a total failure of evidence to support the verdict. Additionally, the verdict was obtained in violation of appellant's constitutional rights by the trial court refusing to recuse herself by her refusal to make the instructions requested by appellant in the Jury Instructions filed by him on March 18, 1986, and because she consciously instructed the jury on the presumptions contained in the Vehicle Code and Penal Code when she was constrained as a matter of law not to do so.

C. Post Trial Proceedings.

Appellant moved subsequent to the verdict of the jury in arrest of proceedings for fraud and trial irregularities immediately upon the jury verdict being rendered on Monday, March 24, 1986. The trial court summarily refused appellant's motion without even considering the record as a whole. Similarly, appellant's motion for a mistrial which was in the form of a written document which appellant specifically incorporates into his proposed statement identified numerous infirming errors of law requiring that the verdict of the jury be set aside. The trial court refused appellant the right to file or lodge the subject motion for mistrial and otherwise acted in a concerted way to deny appellant his right to access to

the legal system and to be heard in a manner consistent with his right to have a fair trial and his right of due process of law. The trial court's prejudice against appellant was further compounded after appellant had made a written demand for a probation hearing and pre-sentencing report demonstrating his outstanding background and which entitled him to his own recognizance release pending an adjudication of the instant appeal.

On March 28, 1986, the matter having been continued on the court's motion to that date, appellant advised the court of his outstanding background, the gross abuse of process being carried out and the fraud associated therewith and his [illegible] trial court and further directed the court's attention to his written demand for a probation hearing and pre-sentencing report filed with the clerk earlier in the week. At that time the court, without jurisdiction, advised appellant that notwithstanding the lack of any diminished capacity defenses, she was ordering appellant to contact a Dr. J. Davidson on or before April 1, 1986, a physician and psychiatrist and furnish appellant with his address and telephone number and also ordered appellant to contact the probation department located in Santa Monica. That the hearing on March 28, 1986 which was a Good Friday, appellant's religious holiday, occurred two days prior to Easter Sunday. On Monday, March

31, 1986, appellant physically went to the offices of Dr. Davidson in Beverly Hills about 2:30 P.M. and physically met and visited with the doctor pursuant to the court order. At that time, Dr. Davidson advised appellant he was with a patient and asked appellant for his address which was furnished to the doctor and appellant further indicated that he wished to shcedule a visit and appointment with him within the next week to ten days and was ordered to do so by the court over his objection. Appellant also contacted the telephone number for the probation department furnished to him by the Clerk of the court on March 28, 1986. On thursday, April 3, 1986 Appellant spent his entire day taking depositions in an action he had been commencing for malicious prosecution and other

[illegible] office located at 3255 Wilshire

Boulevard at which the City Attorney for the City of Los Angeles was in attendance. That on April 4, approximately 6:30 A.M. while in the bathroom in his Westwood apartment, Beverly Hills police and Detective Schwab again gained entry into appellant's apartment, having keys to said apartment, without permission, consent, authorization of appellant, and threatened and handcuffed appellant and intimidated appellant's fiancee. No warrant was shown or produced by said detectives and appellant was advised that Judith Stein ordered that appellant be arrested for having "failed to visit with Dr. J. Davidson," even though he had actually physically visted with him March 31, 1986 -- three days prior to the false arrest by Judith Stein.

Appellant was brought before the court at 5:00 P.M. on April 4, 1986, sitting as Judith Stein, and demanded to know the basis for his arrest, at which time she advised appellant he had not visited with Dr. Davidson, whereupon the trial court refused appellant the right to speak or the right to a hearing and directed that he be incarcerated at the County Jail in Los Angeles. Appellant was body-chained and again transported and incarcerated at Los Angeles County Jail against his will. On Monday, April 7, 1986, appellant was brought before the trial court and again moved for her recusal and demanded that he be entitled to a probation report and hearing and pre-sentencing report. The court would not allow him to speak and proceeded to sentence appellant right then and [illegible] on April, 1986 to six (6) months in the County Jail, no County probation, three (3) years of parole and monetary restitution in an amount to be affixed by the probation department. There was no arraignment on judgment or sentencing by the trial court on April 7, 1986, and no opportunity for appellant to be heard whatsoever.

On April 8, 1987, while appellant was still incarcerated at Los Angeles County Jail, he was once again brought before the trial court whom he recused and he advised the trial court that he was being held as a "political prisoner" and demanded his immediate release from custody. The trial court again prevented appellant from speaking and reiterated his sentence

and again failed to accord appellant his probation hearing, probation report, or to be released on his own recognizance. The trial court also willfully refused appellant's motion to stay the judgment and sentencing pending an appeal to the Appellate Department and a demand that he be released because of his background and commitments in the Los Angeles area on his own recognizance and also denied appellant reasonable bail and ordered him confined on a "misdemeanor charge", first purported offense, fraudulent in nature, with $25,000 bail. Appellant was chained and incarcerated to the Los Angeles County Jail until on or about May 13, 1986 when bail was placed after the amount was reduced by the Appellate Department.

SUMMARY OF MATERIAL FACTS

1. Appellant was furnished subject rental vehicle with written permission and consent of owner pursuant to a written rental contract.

2. Appellant never received demand letter to return vehicle to MPG Car Rental company as letter was returned to sender (MPG) and no other evidence was introduced showing receipt of demand letter.

3. Trial court instructed jury on presumptions contained in § 484 of the Penal Code and § 10855 of the Vehicle Code despite recurring objection to said instructions by appellant.

4. Trial court refused to instruct jury on specific intent, mistake of fact, or mistake of law, or good faith belief in right or claim to vehicle despite written request which was filed on March 18, 1986 by appellant requesting said instructions.

5. MPG is not the legal owner of the rental vehicle.

6. Applicant never waived his right to a speedy trial at any time and no consent express or implied as defined in Penal Code § 1382 exists in the record.

7. That appellant was physically in Westwood at his Wilshire Boulevard address in Los Angeles, California at all material times during the rental period in question.

8. That Appellant was discharging his duties at all material times in Los Angeles as an attorney and made numerous court appearances in State and federal proceedings in Los Angeles right up to his false arrest on June 27, 1985.

9. That appellant specifically moved for written disqualificatio of trial Judge Judith Stein on March 18, 1986 by written affidavit.

10. That appellant filed and made writt[illegible] application

for probation and probation hearing prior to entry of sentencing and judgment on March 28, 1986.

11. That appellant physically visited and met Dr. Davidson at his office in Beverly Hills, on March 31, 1986.

12. That appellant's written motion for mistrial and his motion to have verdict set aside and for new trial were denied by trial court.

13. That appellant's motion to challenge jurors on March 18, 1986 was denied.

14. That apellant moved to dismiss for insufficient evidence was denied at close of People's case.

15. That appellant objected to all exhibits offered in evidence by the People.

16. That appellant objected to all jury instructions made by trial court and specifically demanded a hearing on jury instructions which was required by trial court.

17. That appellant filed a notice of appeal from the April 7, 1986 judgment and sentencing on April 8, 1986.

18. That the trial judge refused to grant appellant

a pre-sentencing probation report, a pre-sentencing probation hearing, despite his timely demand for same.

19. that the trial judge refused to stay the judgment and sentencing pending appellant's appeal to the Appellate Department and compelled Appellant to serve jail time notwithstanding his timely appeal at Los Angeles County Jail.

20. That appellant served more than 50 days in the Los Angeles Central Jail as the result of the false arrest and false conviction and false judgment, the subject of this appeal.

21. That no arraignment on sentencing was afforded appellant when sentenced on April 7, 1986.

22. That evidence exist the subject rental vehicle was not in good working order when taken from appellant's apartment parking facility, it having faulty brakes.

23. that at all material times Detective Schwaub and MPG and Yahil Galil knew of the whereabouts of the subject rental vehicle where it was parked each and every night and where appellant lived.

24. That the distance between appellant's residence and MPG Car Rental office was approximately 2 miles.

25. That appellant traveled to MPG Car rental facility on May 11, 1985, but the offices were closed and appellant inquired about said rental offices at the Union 76 Gas Station physically contiguous to said MPG Car Rental and purchased gas that date and offered the May 11, 1986 areceipt in evidence.

26. That appellant had never been convicted of any crime (misdemeanor or felony) other than the subject false arrest and false conviction and is an attorney duly licnsed to practice law in state and federal forums throughout the United States and listed in Who's Who in American Law.

27. That Jennifer Ayres did work for Detective Schwaub in the Beverly Hills Police Department and did take his message on June 5, 1985 when appellant had called the station.

28. That only appellant could legally receive mail sent to him as registered mail.

III.

ARGUMENT

TRIAL COURT'S INSTRUCTIONS TO THE JURY ON CONCLUSIVE PRESUMPTIONS CONTAINED IN PENAL CODE § 404 AND 10855 OF VEHICLE CODE OVER APELLAN T'S OBJECTION CONSTITUTE FLAGRANT CONSTITUTIONAL INJURY AND IS PER SE REVERSIBLE ERROR.

The record is clear that in the instant appeal that appellant was furnished the subject rental vehicle with the permission and consent of the owner and that the demand letter allegedly sent to appellant was marked "returned to sender" and that no evidence was ever introduced that appellant ever received any other demand letter for the MPG car rental or had knowledge of demand for return of the vehicle.

Accordingly, the instant appeal comes clearly within the ambit of People v. Hemmer, 19 C.A. 3d 1052, 92 Cal. Rptr. 516 (1971) wherein the Fourth District Court of Appeal held the presumptions found in § 484 of the Penal Coee and 10855 of the Vehicle Code to be unconstitutional on their face because they violate [illegible] Fourteenth Amendment due process to have a jury deliberate and decide all elements of the case, and baecause the presumptions are irrational and arbitrary.

The facts of the instant case fortify the holding. As the court noted the presence of intent to commit theft has to exist and where a demand letter is presumably sent but not actually received by the defendant is arbitrary and unconstitutional and any instructions on its effect violates defendant's rights of due process guaranteed by the Fourteenth Amendment.

The Third Circuit in People v. Hedrich, 105 Cal. App. 3d 166, 164 Cal. Rptr. 169 (1980) expounded upon the Henner mandate by holding a trial court instruction on the presumptions

contained in § 484 of the Penal Code and 10855 of the Vehicle Code which directed the jury to conclusively presume defendant's intent to commit theft constituted per se reversible error because it removed an element of the crime from consideration and determination by the jury in violation of appellant's right to a jury trial guaranteed by the 6th and 14th Amendments.

Both Hedrich and Hemmer are of irresistible force commanding this Court to vacate the judgment and sentencing of the trial court herein because their application requires per se reversal.

IV.

TRIAL COURT'S REFUSAL TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS RELATIVE TO MISTAKE OF LAW, MISTAKE OF FACT, GOOD FAITH BELIEF IN RIGHT OR CLAIM TO PROPERTY OR SPECIFIC INTENT OR TO MAKE SUA SPONTE INSTRUCTION PERTAINING TO SAME CONSTITUTES PER SE REVERSIBLE ERROR.

The actions of the trial court to refuse to instruct the jury as requested or to make a sua sponte charge to the jury pertaining to appellant's good faith claim of right and consent to the subject rental vehicle constitutes infirming reversible error.

In cases involving grand theft charges, the Second Appellate Department, the Court of Appeal held that in prosecution for grand theft, trial court's failure to make a proper instruction requested as to the defense that the property was taken by

appellant with good faith claim of title and right to the subject property was prejudicial error (pursuant to a rental contract). People v. Threestar, 213 Cal. Rptr. 510, 167 C.A. 3d 147 (1983).

In People v. Ramirez, 107 Cal. Rptr. 174 (1980), the court stated that an act or omission made under ignorance of fact which disprove any actual intent was a valid defense to the crime of grand theft and court committed reversible error by not so instructing the jury.

Moreover, the trial court's refusal to make sua sponte any instruction that the appellant had acquired the property legally with the owner's consent as in the instant case.

It was held in People v. Navarro, 160 Cal. Rptr. 692 99 C.A. 3d Supp. 1 (1979) that trial court had a sua sponte responsibility1 to instruct the jury that appellant had in fact believed he had a right to the property in question, even though such belief was unreasonable as measured by objective standards. (See also People v. Phelps, 45 Cal. App. 2d 345, 114 P. 2d 71 (1941).

The failure of the trial court to make any instruction whatsoever in the instand case either sua sponte or pursuant to appellant's request constitutes infirming reversible error.

V.

FAILURE TO BRING APPELLANT TO TRIAL WITHIN 45 DAYS FROM THE DAY HE WAS ARRAIGNED CONSTITUTES A DENIAL OF HIS RIGHT TO A SPEEDY TRIAL GUARANTEED BY THE UNITED STATES CONSTITUTION.

Penal Code § 1382 specifically sets forth the requirement for commencing trial in a misdemeanor prosecution. The language of § 1382 is mandatory. Appellant's refusal to waive his right to a speedy trial as evidenced in the transcript of July 1, 1985, specifically refused to consent to a waiver of his rights.

Under these facts, the trial court was compelled to dismiss the proceedings at that point upon demand. The trial court's refusal to do so constitutes reversible error.

VI.

THE TRIAL COURT'S REFUSAL TO STAY JUDGMENT AND SENTENCING AND REMANDING APPELLANT FOR IMMEDIATE INCARCERATION, DESPITE DEMAND THAT JUDGMENT AND SENTENCING BE STAYED PENDING APPEAL VIOLATES THE SUPREME COURT MANDATE ANNOUNCED IN RE BAKKE,

42 Cal. 3d 84, and

Appellant's Due Process Constitutional Guarantees

VII.

THE TRIAL COURT'S REFUSAL TO ACT UPON APPELLANT'S DISQUALIFICATION CONSISTENT WITH LAW CONJOINED WITH PREJUDICE AND ANIMOSITY DIRECTED AT APPELLANT DENIED APPELLANT FAIR

TRIAL GUARANTEED BY THE 14TH AMENDMENT.

VIII.

THE TRIAL COURT'S REFUSAL TO AFFORD APPELLANT A PRE-SENTENCING PROBATION REPORT, OR PROBATION HEARING, DESPITE DEMAND FOR SAME, DENIED APPELLANT EQUAL PROTECTION AND DUE PROCESS OF LAW.

IX.

THE RECORD IS BEREFT OF ANY EVIDENCE WHATSOEVER TO SUPPORT THE JURY FINDINGS OF GUILT AND THE EVIDENCE IS THEREFORE GROSSLY INSUFFICIENT AS A MATTER OF LAW REQUIRING THE JUDGMENT AND CONVICTION BE VACATED.

CONCLUSION

For all the foregoing reasons, together with those advanced at the time of hearing and as more fully appear in the record, Appellant respectfully prays the judgment and sentencing of the trial court be forthwith vacated and the judgment reversed with prejudice.

Dated: November 16, 1987

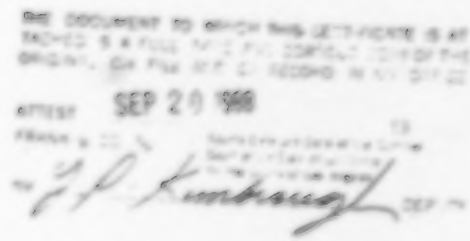
BY: _____
EUGENE JOHN CARELLA, ESQ.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I served a true copy of the foregoing Appellant Brief on all parties 8/14/87 of record by first class mail, postage prepaid, in Los Angeles, California, on the following:

District Attorney
849 S. Broadway
11th Floor
Los Angeles, California 90012

Judith Stein
Beverly Hills Municipal Court
9355 Burton Way
Beverly Hills, CA 90210



EUGENE JOHN CARELLA, ESQ.
P. O. Box 67292
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Los Angeles, California 90067-0292

Appellant

FEB 18 1982

FILED

FEB 18 1982

FRANK S. ZOLIN, County Clerk

By L. A. Kimbrough

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

EUGENE JOHN CARELLA,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Appeal No. CRA 24001

LAMC M 83675

APPELLANT'S PETITION FOR REHEARING AND APPLICATION FOR TRANSFER; DECLARATION OF EUGENE JOHN CARELLA; DECLARATION OF PAUL PFISTER; MEMORANDUM OF POINTS AND AUTHORITIES.

TO: JUDGES OF APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, CENTRAL DISTRICT [WITHOUT WAIVER OF DISQUALIFICATION TO JUDGES NEWMAN, MARGOLIS, WOODS, ROBERTSON]

COMES NOW EUGENE JOHN CARELLA, ESQ., Appellant herein, without waiver of disqualification to Judges of Appellate Department of Superior Court of California, County of Los Angeles, Central District, as constituted, pursuant to the Rules of Court and the Supreme Court mandate in In Re Armstrong, 126 CA 3d 565, 178 CR 902 (1981), and moves this Court for an Order of Rehearing and Reconsideration of the Memorandum Judgment of

February 3, 1988 and further order that a complete Transcript of Proceedings in the void and criminally-inspired and orchest trial proceedings, the subject of this appeal, be prepared and provided to Appellant at public expense and concurrently filed with the Appellate Department of the Superior Court to be used in the adjudication of Appellant's appeal now pending before this Court.

In support of the subject petition of rehearing and reconsideration, Appellant shows this Court the Declaration of Eugene J. Carella, Esq. and Paula Pfister, demonstrating prima facie the fraud committed by the trial court and People in the preparation of the trial evidence as reflected in the Certified Settled Statement settled by the trial court who was disqualified, the egregious abrogation of Appellant's constitutional due process and equal protection rights to have a complete transcript of trial evidence prepared at public expense and filed as part of the record to document his twenty-four (24) grounds on appeal; and a gross misapplicat and misapprehension of facts and law by the Appellate Departmen the members of which are the subject of vigorous disqualificati foreclosing further action and invalidating prior action who have in common enterprise with the trial judge excised and obstructed material evidence from Appellant's record on appeal, all of which summate to deny Appellant-Petitioner herein a fair trial, and constitutionally sufficient adjudicati on appeal. Appellant prays his Petition for Rehearing be granted and that the Appellate Department's judgment of February

1988 affirming tne judgment of the trial court be promptly vacated by a panel of this Court free from bias and prejudice against Petitioner and that the judgment of conviction be vacated post haste because of gross, irreparable and infirming injury and fraud carried out against Appellant, denying Appellant's fundamental right to due process and equal protection of law and a fair trial and fair adjudication on appeal.

Said petition is based on all papers, pleadings, declarations, and the like on file here -- together with memoranda of points and authorities and said further and additional evidence as may be adduced.

DATEAD: February 17, 1988

BY: EUGENE JOHN CARELLA, ESQ.
Appellant

EXHIBIT A

DECLARATION OF PAULA E. PFISTER

I, PAULA E. PFISTER, declare and state as follows:

1. That I reviewed the testimony alleged to have been furnished by me at the time of trial of Eugene J. Carella as represented in the Certified Settled Statement.

2. That the testimony I actually rendered at the trial has been significantly and substantially altered and the statements ascribed to me in the settled statement are not true and correct and are known to be inaccurate by the trial judge and District Attorney.

3. That at the time of trial I testified that I was physically with Mr. Carella on the late afternoon of May 11, 1985 when Mr. Carella physically visited the rental offices of MPG Car Rental at the intersection of Doheny and Wilshire Boulevard.

4. That I further testified that it was my knowledge that Mr. Carella had substantial monies with him when he went to the MPG Car Rental office and did for the purpose of making further and additional payment on his account.

5. That I further testified that MPG Car Rental Office and the Union 76 Service Station physically adjoin one with another and that Mr. Carella after not being able to locate anyone at MPG inquired at the Union 76 station if they knew

EXHIBIT "A"

where the MPG personnel were or if they could accept payment for them.

6. That I also testified that Mr. Carella also secured gas from the Union 76 at Doheny/Wilshire adjoining the MPG office after he could not find anyone and secured a receipt signed and stamped May 11, 1985, which receipt would not be permitted to be entered as evidence at the time of trial.

7. That I further testified that Mr. Carella was physically present and in Los Angeles and at the Century Wilshire Apartment location where he resided for a period of approximately two (2) years at all material times and for each and every night in 1984 and 1985, excepting a weekend visit to Palm Springs, and lived in the Los Angeles area and was prosecuting legal matters in the state and federal court located in Downtown Los Angeles regularly and had made various appearances in these courts during this time in question.

8. That I further state that while on the witness stand Mr. Carella showed me a copy of the receipt he received from the Union 76 service station dated May 11, 1985 which he sought to have me authenticate and souqht to introduce the receipt into evidence, but the court would not let him.

9. That I further state that I personally accompanied Mr. Carella on June 20, 1985 (one week before the false arrest) to the law offices of Roper & Polino located at 3255 Wilshire

Boulevard and attended a conference scheduled by Charles Woodmansee, a court-appointed referee (Jack Newman involuntarily appointed him), in litigation in which Mr. Carella and I were both plaintiffs, e.g., Eugene J. Carella, Esq., Paula Pfister v. Sheraton Corporation, LASC No. 516 399, where Mr. Carella and myself are suing for Unruh Civil Rights violations and false imprisonment, assault and batter charges and numerous other claims for damages and injunctive relief.

10. That I further state that I had personal knowledge that Mr. Carella also during the week of June 20, 1985, a few days before the false arrest, physically visited and met with Roscoe Jones, Director of the Federal EEOC (Equal Employment Opportunity Commission) in Los Angeles, located at 9255 Wilshire Boulevard, the same location of Roper & Polino, and filed a housing and employment discrimination charge with that office still pending with that Federal commission.

11. That I further state that I know that Mr. Carella on June 18, 1985 just nine (9) days before the subject false arrest was in the U. S. District Court for the Central District of California seeking to be heard on the question of $140,000 of attorney fees owed to him in litigation commenced against General Electric, Inc. and his attorney lien granted him by the district judge. This Court is located at 312 N. Spring Street, Los Angeles, California.

12. That Judge Judith Stein prevented Mr. Carella

from introducing evidence of any of these proceedings and/or to take mandatory judicial notice of them, even though Mr. Carella diligently sought to have such evidence introduced at the time of trial on March 17, 1986, and thereafter.

12. That I have specifically reviewed the settled statement certified by Judith Stein on August 17, 1987, and, in particular, the summary of my testimony. The testimony assigned to me is distorted and altered substantially, to wit: 1) I testified I traveled with Mr. Carella to MPG Rental office on the late afternoon of May 11, 1985, not the evening; 2) the statement that she knew that appellant had a large amount of cash on him at the time (May 11, 1985) is true, but the following statement..."she did not know that he was going to do with the money" is an outright lie and falsehood, and known to be such.

13. That I further specifically state that while on the witness chair I was harassed, intimidated and threatened by the trial judge Judith Stein and that she had also violated my rights when I was absent from the courtroom by having my person and purse searched over my protestation and when there was no reason for this conduct.

14. That I further state that the subject rental vehicle was put in a Century Wilshire parking space which was accessible to inspection each and every night in question, located at 10776 Wilshire Boulevard--a little more than a

mile from the MPG Car Rental offices.

15. That I further state that I was percipient to Mr. Carella's false arrest at the Century Wilshire Apartments in the early morning of June 27, 1985 when I heard Mr. Carella inform Detective Schwab that he had spoken to Jennifer Ayres of the Beverly Hills Police Department who advised him "that 'Schwab' was on an extended vacation."

16. That I am aware that Mr. Carella had gone to the Beverly Hills Municipal Court to see the court reporter Robert Marsh (September 1985) on the transcripts when he was ordered arrested again by Judith Stein to prevent him from obtaining the subject transcripts and documenting his appeal.

17. That I had filed a complaint with the Police Department of Inglewood and the District Attorney's office <u>just prior to the false arrest of Mr. Carella on the grand theft and conversion of all my property, files and possessions acquired over a twenty (20)+-year period and monies taken under false pretenses for the safekeeping of this property</u>. Mr. Carella's property, files and possessions and monies were also with this property that was converted/thefted.

18. That the Police Department and District Attorney's office refused to do anything about this matter, and shortly thereafter caused the false arrest of Mr. Carella for the same charges I lodged with them on the theft/conversion of

our property.

The foregoing statements are true and correct to the best of my knowledge and ability.

Executed on this 17th day of February 1988 in Los Anageles, California under penalty of perjury.

Paula Prister

EXHIBIT B

DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE J. CARELLA, ESQ., declare and state as follows:

1. That I am the appellant-petitioner herein.

2. That the foregoing declaration is made in support of my petition for rehearing and application for transfer to the Court of Appeal made alternatively on said petition.

3. That the subject rehearing petition is filed pursuant to Rule 107 of the Rules of Court.

4. That I further state the judgment of the Appellate Department is so grossly infected with constitutional infirmities, as is the trial judgment, that I am seeking and fully intend to seek appropriate intervention by the Court of Appeal and/or State Supreme Court and/or United States Supreme Court to have the subject fraudulent judgment vacated and thrown out because my constitutional rights to a fair trial and for hearing have been irreparably and irrevocably violated.

5. That I am accordingly requesting that this Court stay the issuance of remittitur consistent with Rule 144(c) of the Rules of Court should it not be disposed to grant the instant petition for rehearing to enable me sufficient time to have the constitutional injuries and infirmities complained of reviewed and redressed by a higher court.

6. That I specifically incorporate the declaration of

EXHIBIT "B"

Paula E. Pfister identified as EXHIBIT "A" and attached herewith as being recited in support of this declaration.

7. That the Appellate Department decision, the subject of the petition for rehearing, is grossly defective and constitutionally infirmed for the following reasons:

(a) It was rendered by Appellate Department judges who are disqualified and the subject of a disqualification for cause petition, requiring all orders, judgments and the like of said Appellate Department be vacated;

(b) It is infirmed because Appellant, who is financially indigent, has been deprived of his fundamental constitutional right to a Reporters Transcript of Trial Evidence furnished him and made a part of the Record on Appeal to document his twenty-four (24) grounds for appeal. (In Re Armstrong, 126 CA 3d 565, 128 CR 902 (1981);

(c) The settled statement certified by the trial court is a fraud, sham, nullity and not drawn in conformity with the Rules of Court or mandates of the Supreme Court of the State. (See, People v. Jenkins), and should be stricken.

(d) The memorandum judgment willfully mistates evidence and falsely indicates a waiver by Appellant of his const tutional right to a speedy trial which is in direct contradiction to what actually occurred at the pre-trial proceedings;

(e) The memorandum judgment consciously and willfully fails and refuses to consider and address each of the grounds for appeal set forth in the certified settled statement, each of which requires that the trial court judgment be vacated and thrown out as a matter of law;

(f) That the judgment misapprehends the law with respect to mandatory jury instructions and sua sponte instruction required to be made by the trial judge and further ignores the notice and demand requirements mandated by due process consideration before jury instructions on the presumption of Sections 484 and 10855 of the Penal Code and Vehicle Code can be given;

(g) The combination of the Appellate Department's conscious refusal to order the complete Reporters' Transcripts of Trial Evidence, at the same time it seeks to conclude that no evidence exists to document Appellant's grounds of appeal constitutes an actionable fraud on Appellant and taints the judgment.

8. That I specifically state that in January 1986 prior to the start of the actual trial proceedings, in open court before visiting Judge Morse I had the Court Reporter Douglas Weaver read his notes for the actual proceedings that occurred before Commissioner Murphy on June 27, 1985 and July 1, 1985. At that time, in open court, Mr. Weaver specifically stated that his notes for the subject days stated showed that Appellant "did NOT waive his right to a speedy trial" in response to

the Commissioner's direct questions of waiver.

9. That the court docket in this regard is obviously false, incorrect, and was to have been corrected by Robert Tauger, Clerk in Division 5, who was aware of the incorrect docket entry showing a 'waiver.'

10. The Appellate Department judgment is therefore infirmed because it is based on false and mistaken facts and the Reporters Transcripts will so verify.

11. That the Appellate Department judgment also failed to specifically address the gross error committed by the trial court by refusing to grant Appellant a pre-sentencing probation report, at the same time it immediately sentenced Appellant and refused to stay the sentencing and judgment pending his appeal in derogation of the laws of this State.

12. That I further state the Reporters Transcripts of Trial Proceedings demanded by me to be made a part of the Record demonstrate prima facie the validitiy of the twenty-four (24) grounds for appeal recited by me in my Proposed Settled Statement and command the judgment, the subject of this petition, and the underlying trial court judgment, be forthwith vacated. Accordingly, I specifically demand that the Reporters Transcripts be prepared and filed with this Court at public expense.

13. That two (2) salient grounds for appeal conspicuously

not addressed and omitted by the Appellate Department are the disqualification of the trial court moved by Appellant as reflected on the docket sheet which renders null and void all orders of the trial judge, and the gross acts of prosecutorial misconduct ranging from disparaging references of Appellant to the use of diagrams, charts and documents not authenticated or moved in evidence during the course of the trial.

14. That I advised the Appellate Department as far back as October 1986 that the trial judge, who is disqualified, had consciously interfered with and obstructed my rights to secure the Reporters Transcripts by having me falsely arrested after I was ordered by the Appellate Department to secure from the Court Reporter Marsh information concerning said Reporters Transcripts later.

15. That my right to secure the subject transcripts at public expense is a fundamental constitutional due process right which is essential to ensure me a fair trial and fair appellate adjudication of my rights on appeal.

16. That Judges Newman, Margolis, Robertson and Woods are disqualified from acting in these proceedings and I specifically demand a successor Appellate Department appointed in accordance with law be convened to adjudicate my appeal and all the grounds asserted therein on the basis of a complete and true record on appeal, including the Reporters Transcripts of Trial Proceedings and that they be preempted from acting further herein.

17. That I specifically incorporate my Motion and Demand for Reporters Transcripts at Public Expense, together with Exhibits filed with the Appellate Department on January 26, 1988 into the within declaration.

I declare that the foregoing is true and correct to the best of my knowledge and ability.

Executed on this 17th day of February 1988 in Los Angeles, California, under penalty of perjury.

EUGENE JOHN CARELLA, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.
Statement of the Case

Appellant, a distinguished federal practitioner, was falsely arrested and imprisoned for the "theft" of a rental automobile he secured pursuant to a rental car contract and for which he paid valuable cash consideration in advance. Permission, consent and authorization were furnished to Appellant pursuant to the rental contract. The subject automobile was parked each and every night at Appellant's residence in Westwood located a little more than a mile from the MPG Car Rental offices and easily accessible and observable by MPG personnel.

Appellant has asserted that the entire trial proceedings constituted a nightmarish litany of egregious, heinous, and unprecedented judicial and constitutional abuses perpetrated by the trial judge, Judith Stein, who was hand-picked to falsely incarcerate Appellant to rig the jury pool and jury selection and to deprive Appellant of every major constitutional right and guarantee any American citizen should expect. To obscure and defense her complicity in the criminal racketeering conspiracy against Appellant, the trial judge, whose disqualification was sought by Appellant, has acted during the post-trial phase of the proceedings to frustrate the right of Appellant to secure and file the Reporters Transcript of Trial Proceedings evidencing the gargantuan constitutional irregularities inflicted upon Appellant at trial and subsequent thereto.

Prior to this appeal being scheduled for oral argument on January 28, 1988, on the basis of the financial indigency imposed upon Appellant as a result of these vexatious and false criminal proceedings, he moved this Court for a Reporters Transcript at public expense. Notwithstanding the automatic right to secure said transcripts guaranteed by the Constitution, the Appellate Department willfully denied said motion. (See, In Re Armstrong, supra.) Appellant had also previously sought to have a settled statement certified in accordance with the laws in this State. (See, People v. Jenkins, supra) which was also rebuffed by the Appellate Department.

Appellant, because of the enormous bias, prejudice, and animous manifested by the Appellate Department in securing the Reporters Transcript, and learning of this refusal on February 4, 1988, moved for the immediate disqualification of said Appellate Department, consisting of Judges Newman, Margolis, Woods, Robertson. After having moved for said disqualification of said Appellate Department judges, learned Appellant/ Appellate Department, while at the same time they consciously rebuffed Appellant's fundamental constitutional right to have a reporter's transcript of trial evidence filed to document his twenty-four (24) grounds on appeal, had concurrently rejected Appellant's appeal "on the merits," finding there to be "no evidence" to support Appellant's grounds on appeal. Further, said Appellate Department considered only two or three of the twenty-four (24) grounds for appeal recited by Appellant, notwithstanding that each of the grounds are meritorious

on their face. The order of the disqualified Appellate Department in its present format is a "virulent affront" to constitutional liberty in this country and unless corrected by rehearing and reconsideration constitutes a debauchery of constitutional jurisprudence and value which cripples our entire system of law.

To permit a corrupt trial judge to inflict such enormous constitutional deprivations upon Appellant at the time of trial is reprehensible; to have a specifically-selected Appellate Department acting in common enterprise with that trial judge to bury the evidence with the Appellant is a crime of the highest order.

AN APPELLATE DEPARTMENT CONSTITUTED IN ACCORDANCE WITH LAW MUST VACATE THE NON-FINAL JUDGMENT AND DIRECT REHEARING OF THE SUBJECT APPEAL TO ENSURE APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Rule 107
California Rules of Court

III.

DISQUALIFIED APPELLATE JUDGES MUST VACATE ANY AND ALL ORDERS, JUDGMENTS, OR THE LIKE MADE OR RENDERED BY THEM PRIOR TO THEIR DISQUALIFICATION BEING RECORDED.

- 18 -

Section 170.3
California Rules of Court

IV.

FAILURE OF THE TRIAL COURT TO FURNISH APPELLANT A PRE-SENTENCING PROBATION HEARING UPON DEMAND, CONJOINED WITH HIS IMMEDIATE MISDEMEANOR SENTENCING ABRIDGES DUE PROCESS RIGHT TO A FAIR TRIAL AND IS PER SE REVERSIBLE ERROR.

Fourteenth Amendment
U. S. Constitution

V.

APPELLATE DEPARTMENT HAS MANDATORY OBLIGATION TO FURNISH INDIGENT APPELLANT WHO TIMELY DEMANDS REPORTERS TRANSCRIPTS OF TRIAL EVIDENCE AT PUBLIC EXPENSE AND WHO ASSERTS INSUFFICIENCY OF EVIDENCE, GROSS PROSECUTORIAL MISCONDUCT, AND [illegible] TRIAL COURT BIAS, PREJUDICE, AND DISCRIMINATION IN HIS GROUNDS FOR APPEAL, AND FAILURE OF WITH TRANSCRIPT APPELLATE DEPARTMENT TO SO ACT, CONSTITUTES FATAL ERROR, REQUIRING APPELLATE JUDGMENT AND UNDERLYING JUDGMENT BE THROWN OUT.

In Re Armstrong, supra.

VI.

APPELLATE DEPARTMENT JUDGMENT BASED ON FALSE, FRAUDULENT, AND INCORRECT DOCKET ENTRY, SHOWING WAIVER OF RIGHT TO SPEEDY TRIAL WHEN ACTUAL REPORTERS' TRANSCRIPTS OF ARRAIGNMENT PROCEEDINGS EVIDENCE NO WAIVER OF THESE RIGHTS

IS FLAWED AND MUST SUCCUMB ON REHEARING.

VII.

APPELLATE DEPARTMENT REFUSAL TO CONSIDER AND TO REVIEW AND RESPOND TO EACH OF APPELLANT'S GROUNDS FOR APPEAL (TWENTY-FOUR IN NUMBER), WHICH CONSTITUTE REVERSIBLE ERROR, ABUSE OF DISCRETION OR OTHERWISE INFIRM TRIAL COURT JUDGMENT, COMMANDS THAT THOSE GROUNDS NOT CONSIDERED BE REVIEWED AND REHEARD ON THE MERITS AND A PETITION FOR REHEARING OF THE APPEAL BE ORDERED.

People v. Jerkins, 55 CA 3d, Supp. 55 (1976)

VIII.

APPELLATE DEPARTMENT RELIANCE UPON A "CERTIFIED" SETTLED STATEMENT" SHOWN TO BE A CONSCIOUS FRAUD, MISSTATEMENT, AND PREVARICATION OF TESTIMONY AND OTHER EVIDENCE COMMITTED BY THE DISTRICT ATTORNEY ACTING IN COMBINATION WITH TRIAL JUDGE AND DISQUALIFIED/ APPELLATE JUDGES USED TO AFFIRM JUDGMENT IS PER SE GROUNDS FOR REHEARING, REQUIRING SAID PETITION FOR REHEARING BE GRANTED.

Rule 187, Rules of Court

IX.

APPELLATE DEPARTMENT MISAPPREHENSION OF DUE PROCESS REQUIREMENTS IN HEDRICK AND HEMMER MANDATES INVALIDATES JUDGMENT AND COMPELS REHEARING AND RECONSIDERATION AS A MATTER OF LAW.

- 20 - People v. Hemmer, 19 Cal.App. 3d 1052 (1971)
People v. Hedrick, 105 Cal App. 3d 166

CONCLUSION

FOR ALL THE FOREGOING REASONS, Appellant-Petitioner herein, respectfully prays that the Order entered February 3, 1988, appended as EXHIBIT "C", the subject of the Petition for Rehearing, be reheard and reconsidered.

Appellant further prays that the subject judgment in Appeal No. CRA 24001 after being reheard be forthwith vacated and that a new judgment be entered vacating and throwing out the trial court judgment fraudulently entered April 7, 1986 by Judith Stein because it is wrought with gross constitutional infirmities and judicial error. Alternatively, Appellant asks the judgment be reheard and the appeal be reinstated for hearing for such further and additional argument as may be required by a newly-constituted Appellate Department.

Moreover, should this Court not grant the instant petition, Appellant demands the Appellate Department certify a transfer of the subject appeal to the Court of Appeal in accordance with Rules 62, 63 of the Rules of Court to ensure uniformity of decisions and to protect the integrity of constitutional guarantees that exist in Appellant's favor heretofore evidenced herein. Appellant-Petitioner also respectfully prays that pursuant to Rule 144, the remittitur of the instant appeal be stayed until further order and until Appellant has exhausted his rights to secure intervention

from the Court of Appeal, Supreme Court for the State of California, and/or United States Supreme Court. Said request of stay of remittitur is being made in good faith to fully protect Appellant's fundamental due process guarantees and for such further and additional relief as the Court deems necessary and proper.

DATED: February 19, 1988

BY: _____
EUGENE J. CARELLA, ESQ.

EXHIBIT C

[MEMORANDUM JUDGMENT OMITTED]

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this the 18th day of February 1988 I servied a true copy of the foregoing Appellant's Petition for Rehearing and Application for Transfer; Declaration of Eugene John Carella; Declaration of Paula Pfister; Memorandum of Points and Authorities on all parties of record by first class mail, postage-prepaid, in Los Angeles, California, on the following:

IRA REINER
District Attorney
849 S. Broadway
11th Floor
Los Angeles, California 90012

Judith Stein, Judge
Beverly Hills Municipal Court
9355 Burton Way
Beverly Hills, California 90210

Eugene J. Carella

SEP 20 1988

FILED

CRA 24001

FOLD HERE

IN THE MUNICIPAL COURT

OF [redacted] JUDICIAL DISTRICT

COUNTY OF LOS ANGELES

STATE OF CALIFORNIA

NO. M23675

VS. Eugene John Carella

JURY INSTRUCTIONS

☒ GIVEN

☐ REFUSED

FILED MAR 21 1986

S. E. SEIDLER CLERK

BY J. TAUGER DEPUTY CLERK

COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS

quested by People		Given as Requested		Refused	
quested by Defendant		Given as Modified		Withdrawn	
		Given on Court's Motion			

Date 4/79

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Judge

.000/1

I

Duties of Judge and Jury

Ladies and Gentlemen of the Jury:

Now we come to that part of the trial where you will be instructed on the law.

Whether a defendant is to be found guilty or not guilty depends upon both the facts and the law.

As jurors you have two duties to perform in order to reach a verdict. One duty is to determine the facts of the case from the evidence received in the trial and not from any other source. The word "fact" means something that is proved directly or circumstantially by the evidence.

Your other duty is to apply the law to the facts as you determine them and in this way to reach your verdict.

It is my duty in these instructions to explain to you the law that applies to this case. You must accept and follow the law as I state it to you.

You must not be influenced by pity for a defendant or by prejudice against him.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

16.000/2

You must not be biased against the defendant because he has been arrested; charged with a crime or brought to trial. These facts are not evidence of his guilt.

You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

II

Composition of Instructions

The instructions are to be considered as a whole and each individual instruction is to be considered in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

For simplicity, the masculine form of pronoun as used in the instructions applies equally to all persons.

III

Statements of Counsel, etc.

You must not consider any statement by either attorney as evidence. ~~If the attorneys have agreed~~ on the D

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

6.000/3

to any fact or if any fact has been admitted, that fact is proved.

You must not consider as evidence any offer of proof that was rejected or any evidence that was stricken out.

As to any question to which an objection was sustained you must not guess what the answer might have been.

You must not assume to be true any insinuation suggested by a question asked a witness.

IV

Direct and Circumstantial Evidence

Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact.

Circumstantial evidence is evidence that proves a fact from which an inference of the existence of another fact may be drawn.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

000/4

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS

16.000/5

Sufficiency of Circumstantial Evidence

A finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence [as to any particular count] is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

5.000/6

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

000/7

VI

Admissions and Confessions

A statement made by a defendant other than at his trial may be either an admission or a confession.

An admission is a statement by a defendant, which by itself is not sufficient to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence.

A confession is a statement by a defendant which discloses his intentional participation in the criminal act for which he is on trial and which discloses his guilt of that crime.

You are the exclusive judges as to whether an admission or a confession was made by the defendant and if the statement is true in whole or in part. If you should find that such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true.

Evidence of an oral admission or an oral confession of the defendant ought to be viewed with caution.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

000/8

[No person may be convicted of an offense unless there is some proof of each element of the offense independent of any admission made by him outside of his trial.

However, the identity of the person who committed the offense may be established by an admission.]

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

16.000/9

VII

Credibility of Witness

Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given to his testimony.

In determining the believability of a witness, you may consider anything which tends in reason to prove or disprove the truthfulness of his testimony, such as: his conduct, attitude and manner while testifying; his capacity to hear or see that about which he testified and his ability to recollect or to relate such matters; whether or not there was any bias, interest or other motive for him not to tell the truth; [any statement previously made by him that was consistent with his testimony] [or,] [any statement previously made by him that was inconsistent with his testimony;] [his character for honesty or veracity or for dishonesty or untruthfulness;] [any admission by him that he did not tell the truth;] [his prior conviction of a felony].

If you believe that a witness willfully testified falsely as to a material fact, you should distrust the rest of his testimony and you may disregard all of his testimony.

5.000/10

However, you should bear in mind that discrepancies in a witness's testimony or between his testimony and that of others, if there were any, do not necessarily mean that you should disbelieve the witness, because forgetting is common and innocent mistakes are not unusual. Two persons witnessing the same incident often see or hear it differently.

You also should consider whether any such discrepancy concerns an important fact or only a trivial detail.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

16.000/22

VIII

Weighing Conflicting Testimony

You should not decide any issue merely by counting the number of witnesses who have testified on the opposing sides.

The final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

6.000/12

IX

Sufficiency of Testimony of One Witness

[Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact required to be proved by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.]

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

16.000/13

X

Expert Testimony

[In determining the weight to be given to the opinion of any expert who has testified in this case, you should consider the qualifications and credibility of such expert and the reasons given for his opinion.

You are not bound to accept an expert opinion as conclusive, but should give to it the weight, if any, to which you find it to be entitled.]

[If there was any conflict in the testimony of expert witnesses, you should consider their relative qualifications and credibility in weighing the opinion of one expert against that of another as well as the reasons given for each opinion and the facts upon which it was based.]

COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS

5.000/14

XI

Presumption of Innocence and Burden of Proof

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows:

It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

COMPLETE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

6.000/25

XIII

[General Intent]

[In the offense with which the defendant is charged [in Count _____] there must be a joint operation of act or conduct and criminal intent.

[A person acts intentionally does that which the law declares to be an offense, he is acting with criminal intent, even though he may not know that his conduct is unlawful, or even though he may not intend to violate the law.]

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

.000/16

XIV

[Specific Intent]

[In the offenses with which the defendant is charged [in Counts 1+2,] there must be a joint operation of act or conduct and the required specific intent and unless such specific intent so exists that offense is not committed.]

COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS

00/17

XV

Take No Cue from Judge

I have not intended by anything I have said or done or by any question I may have asked to suggest what you should find the facts to be or that I believe or disbelieve any witness.

If anything I have said or done has seemed to suggest my opinion as to the facts, you will disregard it and form your own opinion.

XVI

Duty to Deliberate

When you start your deliberations, it is important that you avoid expressing a fixed opinion or a determination to hold out for a certain verdict.

Each of you must decide the case for yourself but should do so only after an open-minded discussion of the evidence and instructions with the other jurors.

Once you have reached a conclusion, you should not change it merely because other jurors disagree with you. However, if you become convinced you have reached a wrong conclusion, you should not hesitate to change it.

COMPOSITE BASIC INSTRUCTION FOR
MISDEMEANOR TRIALS

5.000/18

You should remember in deciding this case, that you are not advocates or partisans for either side but that you are the impartial judges of the facts.

XVII

Avoid Considering a Penalty

In your deliberations, or in arriving at a verdict, you must not discuss or consider the subject of penalty or punishment. That is a matter which must not in any way affect your decision.

XVIII

Concluding Instruction

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to reach a verdict, all twelve jurors must agree to the decision [and to any finding you have been instructed to include in your verdict]. As soon as all of you have agreed upon a verdict, you shall have it dated and signed by your foreman and then shall return with it to this courtroom.

(g) Unlawful Taking of Automobile

24001

Analysis

	Inst.No.
Grand Theft of an Automobile (1979 Revision)	14.35
Vehicle Taking—Violation of Vehicle Code Section 10851 (1979 Revision)	14.36
Auto Taking—When Acts May Constitute Either of Two Crimes (1972 Revision)	14.37

FILED
FEB 09 1987
FRANK S. ZOLIN, COUNTY CLERK
BY S. MUSCHIT, DEPUTY

CALJIC 14.35 (1979 Revision)

GRAND THEFT OF AN AUTOMOBILE

[Defendant is charged in [Count 1 of] the information, with the commission of the crime of grand theft, a violation of Section 487 of the Penal Code.]

Every person who steals, takes or drives away the automobile of another with the specific intent to deprive him permanently of his property is guilty of the crime of grand theft of an automobile.

In order to prove the commission of such crime, each of the following elements must be proved:

1. That a person took or drove away the automobile belonging to another person, and

2. That when such person took or drove away the automobile he had the specific intent to deprive the owner permanently of his property.

USE NOTE

This instruction is limited to charge of theft of an automobile by larceny.

If charge is theft of an automobile by false pretenses (People v. McNear, 190 Cal.App.2d 541, 12 Cal.Rptr. 124), use Instruc-

tion 14.10 (1979 Revision) and other false pretenses instructions as necessary.

If charge is embezzlement of an automobile (People v. Swanson, 127 Cal.App.2d 658, 274 P.2d 229), use Instruction 14.07 (1979 Revision).

If charge is theft of an automobile by trick and device (People v. Reinschreiber, 141 Cal.App.2d 688, 297 P.2d 668), use Instruction 14.05 (1979 Revision).

If this instruction is given, Instruction 14.02 (1979 Revision) will be unnecessary.

COMMENT

Penal Code, §§ 484, 487(3); 1 Witkin, Calif.Crimes, § 370(b).

Library References:

West's Key No. Digests, Larceny ⇐23, 70(2), 72, 79

CALJIC 14.36 (1981 Revision)

VEHICLE TAKING—VIOLATION OF VEHICLE CODE SECTION 10851

[Defendant is charged in [Count 2 of] the information, with the commission of the crime of violation of Section 10851 of the Vehicle Code.]

Every person who drives or takes a vehicle not his own, without the consent of the owner, and with specific intent to deprive the owner either permanently or temporarily of his title to, or possession of, the vehicle, whether with or without intent to steal the same, is guilty of the crime of violation of Section 10851 of the Vehicle Code.

In order to prove the commission of [the] each of the following elements must be proved:

1. That a person took or drove a vehicle belonging to another person,

2. That the other person had not consented to such taking or driving of his vehicle, and

3. That when such person took or drove the vehicle he had the specific intent to deprive the owner either permanently or temporarily of his title to or possession of the vehicle.

USE NOTE

Use this instruction and not Instruction 14.35 (1979 Revision) when only charge is a violation of Vehicle Code, § 10851.

Joy riding (Penal Code, § 499b) is a lesser included offense to a violation of Vehicle Code, § 10851, and defendant is entitled to a sua sponte instruction to that effect. People v. James, 157 Cal.App.3d 381, 203 Cal.Rptr. 716.

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COMMENT

Vehicle Code § 10851; 2 Witkin, Calif.Crimes, §§ 658-660; Fricke-Alarcon, Calif.Crim.Law (11th ed.), pp. 395-396.

To constitute a violation of Vehicle Code, § 10851, there must exist a specific intent to permanently or temporarily deprive the owner of title or possession of the vehicle. People v. Johnson, 191 Cal.App.2d 694, 13 Cal.Rptr. 1.

As to element of asportation, see 2 Witkin, op. cit. § 659. Twenty feet held adequate to constitute a taking. People v. White, 71 Cal.App.2d 524, 162 P.2d 862.

The necessary element of a taking or driving "without the consent of the owner" is not established by proof of fraudulently induced consent. People v. Cook, 228 Cal.App.2d 716, 39 Cal.Rptr. 802; People v. Donell, 82 Cal.App.3d 613, 108 Cal.Rptr. 232.

CALJIC 14.37 (1972 Revision)

AUTO TAKING—WHEN ACTS MAY CONSTITUTE EITHER OF TWO CRIMES

COMMENT

A violation of Penal Code, § 499b (taking vehicle to temporarily use) is a lesser included offense to a charge of violating Vehicle Code, § 10851 (taking vehicle with intent to temporarily or permanently deprive owner). People v. Thebout, 141 Cal.App.3d 1011, 190 Cal.Rptr. 754.

When a complaint charging a violation of Penal Code section 10851 also charges "a driving and taking" of a vehicle, a violation of Penal Code section 499b (joy riding) may be a lesser included offense and jury should be instructed sua sponte accordingly. People v. Barrick, 33 Cal.3d 115, 187 Cal.Rptr. 716, disapproving language in People v. Thomas, 58 Cal.2d 121, 23 Cal.Rptr. 161, 373 P.2d 97 to the contrary.

The rule in People v. Barrick, 33 Cal.3d 115, 187 Cal.Rptr. 716 is not retroactive. People v. Hicks, 147 Cal.App.3d 424, 195 Cal.Rptr. 127.

CALJIC 14.37 (1972 Revision)

AUTO TAKING—WHEN ACTS MAY CONSTITUTE EITHER OF TWO CRIMES

The unauthorized taking or depriving by one person of the automobile of another may, depending upon the facts, constitute either of two crimes.

The defendant is charged in Count 1 with grand theft. Every person who steals, takes or drives away the automobile of another with the specific intent to deprive the owner permanently of his property is guilty of grand theft regardless of the value of the automobile.

The defendant is charged in Count 2 with a violation of Section 10851 of the Vehicle Code which provides that any person who drives or takes a vehicle not his own without the consent of the owner thereof, and with the specific intent to steal permanently or temporarily deprive the owner of his title to or possession of such vehicle, is guilty of a public offense.

The distinction between the offenses is in the type of specific intent required:

1. To constitute the crime of grand theft there must be a specific intent to permanently deprive the owner of his property.

2. To constitute a violation of Vehicle Code Section 10851 there must be a specific intent to either permanently or temporarily deprive the owner of his title to or possession of the vehicle.

The defendant may be found not guilty of both counts. If you find him guilty as charged in either

of the two counts, you must find him not guilty of the other.

If you are convinced beyond a reasonable doubt that defendant is guilty of one of the two counts but you have a reasonable doubt as to which of the two counts defendant is guilty, it is your duty to find him guilty of a violation of Section 10851 of the Vehicle Code as charged in Count 2.

USE NOTE

This instruction is designed to be used when the information charges, in separate counts, grand theft of an automobile and a violation of Vehicle Code, § 10851.

COMMENT

2 Witkin, Calif.Crimes, § 658(c).

Where each offense is charged to have occurred at the same time, the accused can be convicted of but one of the offenses. People v. Kehoe, 33 Cal.2d 711, 204 P.2d 321, certiorari denied Kehoe v. People of State of Cal., 338 U.S. 834, 70 S.Ct. 39, 94 L.Ed. 509.

A violation of Penal Code, § 499b (joy-ride statute) is not a lesser and necessarily included offense where the complaint charges defendant under Vehicle Code, § 10851 with the "taking" of the vehicle without the owner's consent "with the intent to deprive the owner of his possession". People v. Thomas, 58 Cal.2d 121, 23 Cal.Rptr. 161, 373 P.2d 97, appeal dismissed, certiorari denied 371 U.S. 231, 83 S.Ct. 327, 9 L.Ed.2d 495.

However, if the complaint charges a violation of Vehicle Code, § 10851, in terms only of "driving without the consent of the owner" and does not charge "a taking", then a violation of Penal Code, § 499b, could be found to be a lesser and necessarily included offense. People v. Marshall, 48 Cal.2d 394, 309 P.2d 456.

Library References:

West's Key No. Digests, Automobiles ⇨337 Larceny ⇨7(1), 7(3).

D. MISTAKE

Analysis

	Inst.No.
Ignorance or Mistake of Fact	4.35
Ignorance or Mistake of Law (1979 Revision)	4.36

CALJIC 4.35

IGNORANCE OR MISTAKE OF FACT

An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime.

Thus a person is not guilty of a crime if he commits an act or omits to act under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful.

USE NOTE

This instruction should be given if requested in a homicide prosecution where defendant's sole defense is that he did not know the gun was loaded. People v. Goodman, 8 Cal.App.3d 705, 87 Cal.Rptr. 665.

This instruction should not be given in a prosecution for receiving stolen property. People v. Ricketts, 7 Cal.App.3d 541, 86 Cal.Rptr. 647.

COMMENT

Penal Code, § 26 (Four), 1 Witkin, Calif.Crimes § 151.

As to what constitutes ignorance or mistake of fact, see People v. Vogel, 46 Cal.2d 798, 299 P.2d 850; People v. Stuart, 47 Cal.2d 167, 302 P.2d 5, 56 A.L.R.2d 705; People v. Hernandez, 61 Cal.2d 529, 39 Cal.Rptr. 361, 393 P.2d 673, 8 A.L.R.3d 1092.

Library References:

West's Key No. Digests, Criminal Law ⇨33, 772(5, 6)

PART 14
CRIMES AGAINST PROPERTY

A. THEFT

(a) Forms of Theft

Analysis

Theft—Forms of ..... Inst.No.
14.00

CALJIC 14.00

THEFT—FORMS OF

The crime of theft may consist of (1) theft by larceny, (2) theft by trick and device, (3) theft by embezzlement, or (4) theft by false pretense.

COMMENT

Penal Code, § 484; 1 Witkin, Calif.Crimes § 365; Fricke-Alarcon, Calif.Crim.Law (11th ed.), pp. 249–251.

Library References:

West's Key No. Digests, Larceny ⇔1, 70(2), 70 et seq.

(c) Trick and Device

Analysis

Theft by Trick and Device—Defined (1979 Revision) ..... Inst. No. 14.05

CALJIC 14.05 (1979 Revision)

THEFT BY TRICK AND DEVICE—DEFINED

[Defendant is charged in [Count 1 of] the information, with the commission of the crime of grand theft, a violation of Section 487 of the Penal Code.]

Every person who obtains possession of personal property of another by means of false promises without intention to perform or by means of fraud, artifice, trick or device with the specific intent to deprive the owner permanently of his property, is guilty of the crime of theft by trick and device.

In order to prove the commission of theft by trick and device, each of the following elements must be proved:

1. That a person obtained possession of personal property of some value belonging to another person,

2. That such person obtained possession by making [a] false promise[s] which he had no intention of performing or by means of other fraud, artifice, trick or device,

3. That in surrendering possession of such property, the other person did not intend to transfer the ownership, and

4. That the person who obtained possession did so with the specific intent to deprive the other person permanently of his property.

COMMENT

1 Witkin, Calif.Crimes, § 377; Fricke-Alarcon, Calif.Crim. Law (11th ed.), pp. 278–281.

Library References:

West's Key No. Digests, Larceny ⇔14, 70(1, 2).

(d) Embezzlement

Analysis

	Inst.No.
Theft by Embezzlement—Defined (1979 Revision)	14.07
Embezzlement—Trustee May Be Agent for Owner	14.08

CALJIC 14.07 (1979 Revision)

THEFT BY EMBEZZLEMENT—DEFINED

[Defendant is charged in [Count 1 of] the information, with the commission of the crime of grand theft, a violation of Section 487 of the Penal Code.]

Every person to whom property has been entrusted who fraudulently appropriates such property to his own use or purpose, is guilty of the crime of theft by embezzlement.

In order to prove the commission of theft by embezzlement, each of the following elements must be proved:

1. That a relation of trust and confidence existed between two persons,

2. That pursuant to such relationship one of those persons accepted property entrusted to him by the other person, and

3. That with the specific intent to deprive the other person of his property, the person fraudulently appropriated or converted it to his own use or purpose.

USE NOTE

When this instruction is given, an appropriate instruction (Instructions 14.21–14.24) as to distinction between grand and petty

theft and the duty of the jury to fix the degree must be given (Instruction 14.20).

Where defendant is charged with embezzlement, if it appears that he relies on the defense of openly and avowedly appropriating the property under a claim of title preferred in good faith (Penal Code, § 511), the court must give, sua sponte, a correct instruction of that defense. People v. Stewart, 16 Cal.3d 133, 127 Cal.Rptr. 117, 544 P.2d 1317.

COMMENT

Penal Code, §§ 484, 503, 506; 1 Witkin, Calif.Crimes, §§ 287-392; Fricke-Alarcon, Calif.Crim.Law (11th ed.), pp. 261-272.

A partner may be found guilty of embezzling partnership property. People v. Sobiek, 30 Cal.App.3d 458, 106 Cal.Rptr. 519, certiorari denied 414 U.S. 855, 94 S.Ct. 155, 38 L.Ed.2d 104.

Library References:

West's Key No. Digests, Embezzlement ⇔4, 46.

★ CALJIC 14.08

EMBEZZLEMENT—TRUSTOR MAY BE AGENT FOR OWNER

If you find that money or property was entrusted to the defendant, and thereafter was fraudulently appropriated by him, it is immaterial whether such money or property was entrusted to the defendant by the owner directly or by a third person acting for the owner.

COMMENT

People v. Walker, 144 Cal. 1, 77 P. 705.

Library References:

West's Key No. Digests, Embezzlement ⇐48(3).

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(f) Degrees of Theft

Analysis

Grand and Petty Theft—When Distinction Depends on Value ($400, Point of Demarcation) (1983 Revision) 14.21
Grand and Petty Theft—When Distinction Depends on Value ($100, Point of Demarcation) (1983 Revision) 14.22
Grand and Petty Theft—Theft by Agent, etc., Over $400, in Twelve-Month Period (1983 Revision) 14.25

CALJIC 14.21 (1983 Revision)

GRAND AND PETTY THEFT—WHEN DISTINCTION DEPENDS ON VALUE ($400, POINT OF DEMARCATION)

When property such as that alleged to be involved in this case is taken by theft, if the value of the property exceeds four hundred dollars, the crime is grand theft; if the value is four hundred dollars or less, the crime is petty theft.

[When labor is obtained by theft, if the value of the labor exceeds four hundred dollars, the crime is grand theft; if the value is four hundred dollars or less, the crime is petty theft.]

USE NOTE

This is a general instruction and applies to theft of money, labor or real or personal property not otherwise specifically referred to in Penal Code, § 487, after the first clause or in Penal Code, §§ 487a, 487b and 487d.

COMMENT

Penal Code, § 487(1); 1 Witkin, Calif. Crimes, § 368; Fricke-Alarcon, Calif. Crim. Law (11th ed.), p. 252.

The 1983 Revision of CALJIC 14.21 incorporates the 1982 amendment of Penal Code, § 487.

The 1982 amendment (Stats.1982, ch. 80) was not intended to be retroactive. Stats.1982, ch. 935.

5

People's Special Instruction #1

Requested by People	X	Given as Requested		Refused	
Requested by Defendant		Given as Modified		Withdrawn	
		Given on Court's Motion			

Judge

Presumption Respecting Theft by Fraud

Intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

Penal Code Section 484 (b)

People's Special Instruction #2

Requested by People	X	Given as Requested		Refused	
Requested by Defendant		Given as Modified		Withdrawn	
		Given on Court's Motion			

Judge

Presumption Respecting Embezzlement of a Leased or Rented Vehicle

Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

Vehicle Code Section 10855

People's Special Instruction #3

Requested by People	X	Given as Requested		Refused
Requested by Defendant		Given as Modified		Withdrawn
		Given on Court's Motion		

Judge

Manifestation of Intent

The intent or intention is manifested by the circumstances connected with the offense.

Penal Code Section 21 (a)

Intention to defraud: sufficiency

Whenever an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, ~~or body politic~~ or corporate, whatever.

Penal Code Section 8

EDITOR'S NOTE:

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM 1988

NO: 87-6997

EUGENE JOHN CARELLA,

Appellant/Defendant

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee/Plaintiff

APPEAL FROM ORDER AND JUDGMENT OF
THE SUPERIOR COURT, STATE OF CALIFORNIA,
FOR THE COUNTY OF LOS ANGELES

APPELLANT'S OPPOSITION TO APPELLEES' OUT-OF-TIME MOTION TO DISMISS APPEAL

EUGENE J. CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

Appellant

In Forma Pauperis

10537

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PRELIMINARY STATEMENT

COMES NOW, EUGENE JOHN CARELLA, Appellant herein, and does hereby and herewith and in no uncertain manner, oppose Appellee State of California's **six (6) month belated Motion to Dismiss Certain Portions of the Hereinabove referenced Appeal** -- e.g., No. 87-6997, and respectfully prays an Order issue promptly denying said motion with prejudice and that Appellant be accorded all that relief requested in his Jurisdictional Statement filed May 17, 1988, and his Motion to Vacate, Set Aside, and Reverse Judgment and Additional Relief filed May 26, 1988, as more fully appear in **Appendix "A"** attached herewith.

In support of said Opposition, Appellant specifically incorporates his Jurisdictional Statement in its entirety filed on **May 17, 1988**, and his Motion to Vacate, Set Aside and Reverse Judgment filed **May 26, 1988**, together with such further and additional documents and evidence to be adduced herein and, specifically, the Reporters Transcript(s) of Trial Proceedings demanded by Appellant to be furnished him at public expense.

Appellant further specifically and unequivocally demands that this Court forthwith furnish Appellant at public expense the complete, comprehensive and true Reporters Transcript(s) of all those trial proceedings forming the subject of this Appeal now before the Court, manifesting a litany of unspeakable and gross constitutional injuries

and abuses that shock the conscience of this Court and threaten the very foundations of our constitutional liberties. Said demand for reporters transcripts contemplates that said transcripts be also made a part of the Record on Appeal, as constitutionally required by this Court's mandates in Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington, 357 U.S. 214 (1958); Williams v. Oklahoma City, 395 U.S. 458 (1969) -- prior to an adjudication of any element of Appellant's within appeal prosecuted by him informa pauperis as more fully appears from Appellant's Motion and Demand for Reporters Transcripts at Public Expense and Declaration of Appellant filed and denied by the Appellate Department--BEFORE the Los Angeles Superior Court, Appellate Department, entered its judgment and mandate affirming the trial court judgment as more fully appears in Appendix "C" [Appellant's Motion and Demand for Reporters Transcripts at Public Expense filed January 26, 1988] and Appendix "D" [Order of Los Angeles Superior Court Appellate Department, denying said Motion and Demand for Reporters Transcripts filed January 28, 1988].

Notwithstanding the foregoing, Appellees have consciously and willfully misrepresented to this Court that Appellant's Motion and Demand for Reporters Transcripts was filed "well after briefing and oral argument" when, in fact, said motion was filed prior to oral argument. Such misrepresentation constitutes a gross fraud upon Appellant and this Court. [See Page 6, footnote 7, of Appellees' Motion to Dismiss], requiring that Appellees be sanctioned in an appropriate way by this Court.

Hereinafter set out in their entirety are the twenty-three (23) grounds for appeal relied upon by Appellant in his Appeal before the Los Angeles Superior Court, Appellate Department, and as cause to his motion to receive reporters transcripts of trial evidence which was willfully denied by said Appellate Department whose judgment is now before this Court on appeal:

GROUNDS ON APPEAL

1. Appellant's right to a speedy trial guaranteed by state and federal constitutions was grossly abridged by the Court's denial of Appellant's Motion for Mandatory Dismissal pursuant to Section 1382 of the Penal Code, and said denial constitutes reversible error.

2. The trial court's failure to stand recused and disqualified in accordance with Appellant's Disqualification Petition and its failure to permit Petition to be filed or lodged constitutes reversible error.

3. Trial court's extreme and gross bias and hatred against Appellant and in favor the The People--including threats of oppression, incarceration and punitive fines--deprived Appellant his right to receive a fair trial and other constitutional rights.

4. Court's refusal to dismiss the Complaint and declare the statutory presumptions contained in Section 10855 of Vehicle Code and 484 of the Penal Code unconstitutional, constitutes an abuse of discretion and reversible error.

5. Trial court's refusal and failure to instruct the jury in accordance with Appellant's Written Jury Instructions and Charges filed by Appellant on March 18, 198[illegible] and its failure to make any sua sponte instructions regarding Appellant's defense that "legal title and permission to the subject vehicle was entrusted to him pursuant to written contract" constitutes infirming reversible error.

6. Trial court's instruction to the jury over Appellant's continuing objection with respect to the presumptions contained in Vehicle Code Section 10855 and Penal Code Section 484, deprived Appellant of his constitutional rights to a jury trial and fair trial and otherwise constitutes fatal reversible error.

7. Trial court's refusal to admonish and prohibit the prosecution for its misconduct in presenting prejudicial charts and graphs not in evidence to the jury and prosecutor's reference to such documents through the course of the trial and other prosecutorial misconduct constitutes infirming reversible error and denied Appellant's right to a fair trial.

8. Trial court's failure to grant Appellant's Motion to Dismiss on the grounds that the subject criminal proceeding is a prosecution for a "civil debt", for enforcement of a "civil contract", constitutes reversible error.

9. The court's refusal to dismiss the complaint on the grounds that the statutes in question are void for vagueness and ambiguity thereby denying Appellant his due process rights constituting reversible error.

10. Trial court's refusal to grant Appellant's Motion to Dismiss at close of People's case on the basis of insufficient evidence constitutes reversible error.

11. Trial court's refusal to grant Appellant's Motion for Mistrial and for Motion for Judgment Notwithstanding the Verdict constitutes prejudicial, reversible error and gross abuse of discretion.

12. Trial court's refusal to strike People's Jury Instructions or to Accord Appellant Hearing on Jury Instructions constituted prejudicial reversible error and abuse of discretion.

13. Trial court's refusal to grant Appellant a Probation Hearing and accord him a Pre-Sentencing Report after it had set the matter for probation hearing on May 13, 1986 -- together with arbitrary and capricious pre-sentencing conditions and revocation of Appellant's own recognizance status and placing him under excessive bail and physical danger constituted a denial of due process of law and is reversible error.

14. Trial court's denial of Appellant's Motion for Judgment in Arrest of Proceedings for Fraud and Trial Irregularities including jury tampering constituted reversible error.

15. Court's failure to properly arraign Appellant on the subject charges--together with the failure of the Court to properly discharge its duties to Appellant at arraignment of sentencing and judgment denied Appellant his right to a fair trial.

16. Trial court's refusal to permit inquiry and questioning by Appellant into juror pool and the undue voir dire restriction into bias and conflict of interests of jurors constitutes infirming reversible error.

17. The trial court ex parte, in collusion with The People, conspired to fix the jury pool and jurors assigned to the case, and the jury verdict entered on March 24, 1986 was secured by fraud, trickery, deceit and conspiracy between the trial court and The People and various jurors and alternate jurors.

18. The verdict of the jury entered on March 26, 1986 is unsupported by any evidence and was the product of a common enterprise to harm Appellant irreparably and his reputation and livelihood and secured by fraud.

19. The trial court's denial of Appellant's Motion For a New Trial constituted infirming reversible error.

20. The trial court's failure to admit Appellant's evidentiary exhibits and/or Take Mandatory Judicial Notice of Legal Proceedings in which Appellant was participating in California and other forums constituted infirming reversible error.

21. Trial court's refusal to Strike People's Evidentiary Exhibits that were NOT properly authenticated constituted infirming reversible error and should have been suppressed.

22. The trial court's imposition of sentencing Appellant to six (6) months in County Jail with no probation--together with three (3) years of parole--is a cruel, unusual punishment and in excess of the statute and unconstitutional, and must be vacated forthwith, especially in light of the fraud associated with the subject sentencing to prevent Appellant from prosecuting other matters as an attorney and/or plaintiff.

23. For such further grounds as appear from the Transcript of Evidence to be filed herein, including, but not limited to

the face that t... subject arrest and conse ent proceedings were a fraud, nullity and carried out in total absence of any probable cause and trial court's refusal to dismiss proceedings were in concert with third parties to harm and falsely imprison Appellant.

APPELLANT'S CROSS-STATEMENT

Appellees, were duly served by Appellant with Appellant's Notice of Appeal on **April** 11, 1988 and Jurisdictional Statement on **May** 17, 1988, invoking the mandatory appellate jurisdiction of this Court pursuant to 28 U.S.C. Section 1257(2), and were also duly served with Appellant's Motion made pursuant to 28 U.S.C. Section 2106 to Vacate, Set Aside and Reverse the false malicious misdemeanor criminal conviction and judgment obtained pursuant to a racketeering conspiracy (directed and orchestrated against Appellant by the United States intelligence apparatus in combination with third persons to destroy Appellant's credibility, reputation and livelihood) on May 26, 1988, and voluntarily elected not to make or file a response, answer or opposition to said motions [Appellant's Appendix B attached herewith], and thereby **waived** any challenge or objection to the obligatory jurisdiction of this Court. Accordingly, this Court is under an affirmative legal duty (it has no discretion) to adjudicate Appellant's within appeal and motion on the **merits**. Appellant has further made and filed a proper affidavit and motion to proceed **in forma pauperis** and the Appellee(s) have made no opposition [and there is none] to Appellant proceeding in forma pauperis and that he be afforded all the rights, benefits and protections engendered by said legal status consistent with Rule 46 of the Rules and aforeferenced mandates of this Court.

On or about September 1, 1988 approximately six months after the appeal was properly docketed and this Court was noticed by Appellant of its obligatory and mandatory jurisdiction to adjudicate the merits of the instant appeal, "the Court" sua sponte directed Appellee State of California to respond to the Jurisdictional Statement. Appellant construes such **out-of-time dispensation** to be gross, unfair, and a 'slanted' application of the Rules of this Court to unduly favor and confer specialized treatment and consideration upon Appellee State of California and to disadvantage Appellant who has punctually complied with all the Rules of this Court and the United States Code to perfect his appeal. Appellant reads 28 U.S.C. Section 1257(2) as compelling the Court to adjudicate the within Appeal and motion(s) on "the merits", as Appellees had **waived** all proper challenge to this Court's mandatory jurisdiction by failing timely to register said challenge in accordancae with the Rules of Court.

Notwithstanding Appellees' Motion to Dismiss, Appellees concede that the mandatory jurisdiction to adjudicate the constitutional invalidity of the two state statutes attacked at trial and appeal by Appellant as being seriously and irreparably violative of Appellant's Fourteenth Amendment due process guaranteés has been properly invoked by Appellant in his Jurisdictional Statement and Appeal. (See, Appellees' Motion, at pp. 3, 4).

Appellees' concession to this Court's obligatory jurisdiction is a persuasive affirmation of its validity in the instant Appeal.

The Court must now proceed to adjudicate Appellant's motion and appeal **on the merits**, as they are constrained by Congress from abstaining to exercise their 28 U.S.C. Section 1257(2) jurisdiction, which is mandatory, and has an affirmative legal duty to rule on the merits of the appeal and motion properly before it, and has further appellate jurisdiction under 28 U.S.C. Section 2106 and 28 U.S.C. Section 1651 to grant Appellant the relief sought by him in his Jurisdictional Statement and Motion to Vacate, Set Aside, and Reverse Judgment on file with this Court since May 1988 -- a period in excess of six (6) months.

Of further moment to this Court is the admission by Appellee, People of the State of California, that both trial court and appellate department had committed grievious constitutional error at the trial and appellate adjudication of Appellant's cause [see, Appellee's Motion, page 10, footnote 11], wherein Appellee states:

> "We regret conceding error by the Appellate Court; however, in Appellee's brief submitted to the Court it was stated: 'The trial court erroneously instructed the jury with respect to the presumption because it failed to clearly indicate that the jury might have, but was not required, to infer the intent to commit theft by fraud' ...". A reasonable jury could have therefore interpreted the statutory presumptions embodied in the instructions as conclusive or

mandatory, or as a mandatory presumption. Appellee further concedes: "In either way, the jury would have been erroneously instructed since the prosecution would be therefore relieved of the burden of persuasion on an element of an offense." Francis v. Franklin, 471 U.S. at 313, 314 [Appellees' Motion, at page 10, para. 1].

This Court can also draw upon its 28 U.S.C. Section 1257(3) jurisdiction conferred by Congress which empowers this Court in addition to mandatory jurisdiction invoked by Appellant pursuant to Section 28 U.S.C. Section 1257(2), when "the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set out or claimed under the Constitution, treaties or statutes of, or commission held, or authority exercised under the United States." Rule 17(b)(c) of the Rules of Court provides Appellant with even still more compelling authority for the exercise of jurisdiction to adjudicate the within appeal and constitutional questions presented therein on the merits.

APPELLANT'S COUNTER-ARGUMENT

Appellant has set forth in his Jurisdictional Statement and Motion to Vacate, Set Aside and Reverse Judgment such a plethora and wide-range of constitutional offense and injury and engendered this injury in the constitutional

questions presented for review. Appellee has conceded substantial error by the trial court and appellate department, but would have this Court believe that our Constitutional jurisprudence "is no big deal!" Appellant, very much to the contrary, has set forth twelve (12) profound constitutional questions and seeks to have the state statutes under which Appellant was falsely and maliciously prosecuted and convicted declared constitutionally void and invalid by this court, and to further demonstrate the judgment of misdemeanor conviction is so attended and fraught with constitutional infirmities that it be thrown out and vacated post haste.

This Court's mandate in Francis, supra, was recently reaffirmed last term (January 1988) in Yates v. Aiken, 108 S.Ct. 534 (1988) where a unanimous Court upheld the constitutional guarantee that..."the due process clause of the Fourteenth Amendment prohibits jury instructions that have the effect of relieving the state of its burden of proof beyond a reasonable doubt on every essential element of an offense."

Appellant has enunciated twenty-three (23) separate grounds for appeal in the trial court and appellate department commencing in June 1986. These grounds for appeal reflect an egregious abuse of Appellant's constitutional guarantees and protections and are set forth in their entirety and appear in Appellant's Motion and Demand for Reporters Transcripts at Public Expense filed on January 26, 1988 before the appeal was argued or submitted, and before final

judgment was rendered by the Appellate Department. [See Appendix C.]

Appellant has demanded and urged that he be furnished a reporters transcript(s) of trial proceedings, as they evidence a wanton, heinous violation of his constitutional safeguards and protections and manifest prima facie a denial of fundamental fairness and a fair trial. The trial court had Appellant falsely imprisoned when he sought to secure said Reporters Transcript(s) and the Appellate Department and Court of Appeal and State Supreme Court have all denied Appellant [an informa pauperis defendant] the right to the transcripts of evidence. In the same breath that the reporters transcripts of trial evidence were willfully denied Appellant, the Appellate Department held there was "no evidence" to support Appellant's lack of specific intent or to vindicate his grounds on appeal -- twenty-three (23) in number! In Appellant's timely Petition for Rehearing and Application for Transfer he attacked the Order of the "disqualified" Appellate Deparatment as a "virulent affront" to constitutional liberty in this country, constituting a "debauchery of constitutional jurisprudence and values which cripples our entire system of law." (See Appellees Appendix, at p. 66. Appellant urged that he be furnished with the reporters transcripts consistent with the California appellate holding of In Re Armstrong, 126 C.A. 3d 565, 178 CR 902 (1981) that "a misdemeanor defendant upon his request is constitutionally entitled to a verbatim 'record of sufficient completeness," permitting proper consideration of an

appeal..." 178 C.R. at 908.

This Court commencing with Griffin v. Illinois, supra, has constitutionally enshrined the right of a misdemeanor indigent defendant, such as appellant, to the "basic tools of an adequate defense or appeal, when those tools are available for a price to others." This Court in Griffin found that failure to provide the Appellant with a trial transcript for use on Appellant's appellate review constituted a denial of equal protection and due process of law guaranteed Appellant by the Fourteenth Amendment. This appellant asserts the same injury. (See Appellant's Petition for Rehearing, at Appellees Appendix 47-71A, inclusive.) In the declaration Appellant, in support of his Petition for Rehearing, states:

> "That I advised the Appellate Department as far back as October 1986 that the trial judge who is disqualified, had consciously interfered with and obstructed my rights to secure the Reporters Transcripts by having me again falsely arrested..." Para. 14..."That my right to secure the subject transcripts at public expense is a fundamental constitutional due process right which is essential to ensure me of a fair trial and fair appellate adjudication of my rights on appeal." [Appellees' Appendix 62].

Appellant's frustrated access to the reporters transcripts and other deliberate obstructions to his constitutional rights of equal access prompted a letter to Richard Bretzling, Special Agent-in-Charge, the Federal Bureau of Investigation (see Appendix E), and further advised the Bureau that various federal and state statutes, including the disqualification statutes of the State of California which extend to both the trial judge and Los Angeles Superior Court, appellate department judges, all of whom were recused

by Appellant were being criminally subverted and abridged to deny Appellant equal protection and equal access to the courts and deliberately designed to prevent him a fair trial before an impartial judge. See, Aetna Life Insurance Company v. Lavoie, 475 U.S. 813 (1986) holding that a state judge refusal to disqualify himself constituted a denial of appellant due process rights of a fair trial guaranteed by the Fourteenth Amendment.

Appellant has asserted that the trial transcripts of evidence are necessary to prove and document that he sustained infirming constitutional injury and to indicate the grounds for appeal, but the appellate department refused to furnish Appellant with said transcripts despite his right to have same.

Appellee now seeks to use an emaciated record with the transcripts of trial evidence 'omitted', to support their false and spurious arguments to this Court that various of Appellant's federal questions sought to be reviewed were not timely or properly raised and do not raise a substantial federal question. This Court must not indulge such out and out rank artiface and distortion.

The abuses to Appellant's constitutional rights are so strident that he stated in his Petition for Rehearing ... "the judgment of the Appellate Department is so grossly infected with constitutional infirmities, as is the trial judgment, that I am seeking and fully intend to seek appropriate intervention by the Court of Appeal and/or State Supreme Court to have the subject fraudulent judgment vacated

and thrown out because my constitutional rights to a fair trial and fair hearing have been irreparably and irrevocably violated." [Appellees' Appendix, p. 58.]

Appellant is entitled as a matter of law to the reporters transcript of trial evidence which prima facie rebuts each and every assertion made by Appellee in its motion to dismiss.

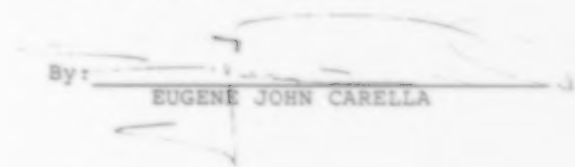
CONCLUSION

FOR ALL THE FOREGOING REASONS, Appellant respectfully prays an Order issue promptly denying with prejudice all that relief sought for by Appellee in their motion to dismiss on Page 12 of said document and, specifically, Paras. 1, 2, 3, and that Appellant be accorded all the relief sought by him in his Jurisdictional Statement and Motion to Vacate, Set Aside and Reverse Judgment filed on May 17, 1988 and May 26, 1988, respectively and that he be furnished at public expense a true and correct reporters transcripts of trial proceedings in accordance with his demand and constitutional right as an informa pauperis appellant, and that he in all ways be afforded with the rights and protections of a litigant authorized to proceed informa pauperis before this Court in accordance with Rule 46 of the United States Supreme Court and that this Court act in accordance with its jurisdiction pursuant to 28 U.S.C. Section 1257(2) and (3) to invalidate the state statutes in question, discharge Appellant from custody, and exonerate in Appellant's favor all legal undertakings or the like and enjoin further malicious prosecution by The People, and such

further and additional relief--including costs, expenses and attorney fees associated with the defense of this willful malicious proceeding and preparation of the instant appeal.

Dated: October 21, 1988

Respectfully submitted:



By: _____
EUGENE JOHN CARELLA

APPELLANT

In Forma Pauperis

FILED
MAY 26, 1988

IN THE

UNITED STATES SUPREME COURT

NO: 87-6997

EUGENE JOHN CARELLA,

Appellant/Defendant

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee/Plaintiff

ON APPEAL FROM ORDER AND JUDGMENT OF
THE SUPERIOR COURT, STATE OF CALIFORNIA,
FOR THE COUNTY OF LOS ANGELES
APPELLATE DEPARTMENT

MOTION TO VACATE, SET ASIDE, AND REVERSE JUDGMENT AND ALTERNATIVE RELIEF

EUGENE J. CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

APPELLANT

15

COMES NOW EUGENE JOHN CARELLA, appellant herein, in the aforecaptioned appeal, pursuant to 28 U.S.C. Sections 2104, 28 U.S.C. Section 2106, and Rules of Court 10, 11, 12 and the controlling mandates of this Court implementing said statutory provisions, and does respectfully move this Court for an Order reversing and otherwise vacating the judgment and orders now before this Court on appeal, as more fully appear in the Jurisdictional Statement and Appendix duly filed in this cause and specifically incorporated into this motion as EXHIBITS "B" and "C." Alternatively, should this Court require further and more extensive briefing on the gross constitutional invalidity of the state statutes, the subject of this appeal (e.g., Penal Code 484 and Vehicle Code Section 10851 and 10855), and the other constitutional infirmities and aberations engendered and set forth herein, Appellant respectfully prays this Court suspend, bar and prohibit any further action in or by the Los Angeles Municipal Court, Beverly Hills Judicial District and Los Angeles Superior Court, Appellate Department, each court having been divested of all jurisdiction in the above-entitled cause by virtue of the Notice of Appeal filed on April 11, 1988 and the perfecting and docketing of the subject appeal in conformity with the Rules of this Court and law, pending a final adjudication of this Appeal by the Court. The per se constitutional invalidity of the two state statutes by which the criminal misdemeanor prosecution was commenced against Appellant, and by which his false conviction and false imprisonment have been carried out, conjoined with the other constitutional injuries recited in his Appeal as more fully appears in the Jurisdictional Statement attached herein compels that all

state proceedings, including further execution upon the null and void judgment of conviction and void appellate remittitur affirming said judgment be stayed and suspended and/or vacated by this Court pursuant to the plenary powers vested in this Court by virtue of 28 U.S.C. Section 2106 [see, Grosso vs. United States, 390 U.S. 62, 19 L.Ed. 2d 906, 88 S.Ct. 709 (1967); Haynes v. United States, 390 U.S. 85, 19 L.Ed. 2d 923, 88 S.Ct. 722 (1967); and United States v. Covington, 395 U.S. 57, 23 L.Ed. 2d 94, 89 S.Ct. 1559 (1969)] and authorizing the Court to take action that is "just under the circumstances."

Further, there is substantial appellate precedent for this Court to utilize 28 U.S.C. Section 2106 jurisdiction to invoke its inherent powers to throw out and set aside a jury verdict and judgment procured by fraud and so infirmed, gross and contrary "to right or reason", and to enter an appropriate judgment of its own by way of remittitur in the cause directed to the trial court. Caddy v. American Home Products, 557 F.2d 36 (8th Cir. 1977). Further authority commanding this Court to take the action demanded by Appellant of throwing out and setting aside the void judgment and/or staying and suspending all proceedings and effectiveness of Orders in the trial court and/or Appellate Department in the alternative pending adjudication of the Appeal on the merits and after full briefing on a complete record is authorized by Rule 11 of the Rules of this Court (Supreme Court).

The illustrative note contained in Rule 11 states:

> When notice of appeal to United States Supreme Court has been filed within the time prescribed, an appeal has been taken and district court thereafter is without jurisdiction...
>
> [emphasis added]

See, Schempp v. School District, 184 F.Supp. 381, 3 FRD 2d 1034; Associated General Contractors v. Secretary of Commerce of United States, 459 F.Supp. 766, 77 FRD 3d 31 (1977 Cal. C.D).

The force of 28 U.S.C. Section 2104 is operative in the instant appeal and its effects can be assimilated to the present appeal. The pertinent section states in relevant portion that "an appeal to the Supreme Court from a state court judgment shall be taken in the same manner and under the same regulations and shall have the same effect as if the judgment and decree appealed from had been rendered in a court of the United States." [emphasis added.]

These provisions of the United States Code, taken in combination with the authorities cited hereinabove, together with the Supremacy Clause of the United States Constitution, constrain both state courts, e.g., Los Angeles Municipal Court and Los Angeles Superior Court Appellate Department, from acting while this Appeal is still pending in this Court and proscribe and prohibit the State of California from acting in any manner which would derogate from the jurisdiction of this Court.

Accordingly, this Court is compulsed to stay and suspend and/or vacate all further state action and proceedings pending a full adjudication of this Appeal.

WHEREFORE, Appellant, on the basis of the premises advanced herein--together with all those reasons more fully recited in the Jurisdictional Statement and Appendix--and supporting Declaration attached herewith, respectfully prays

that an Order issue forthwith from the entire court granting Appellant's Motion to Set Aside, Vacate, and Reverse the state judgment (the subject of this Appeal); that an Order further issue declaring the constitutional invalidity of the state statutes attacked in this Appeal, e.g., Penal Code Section 484 and Vehicle Code 10851 and 10855 for the reasons set forth in the Jurisdiction Statement attached herewith and further direct that Appellant be discharged from the onus of the void judgment and conviction forthwith and because of the despicable and irreversible constitutional injuries already inflicted upon Appellant, the State of California be prohibited and enjoined from carrying out a subsequent prosecution. Alternatively, should this Court not wish to act prior to full briefing and submission of the Appeal, Appellant demands this Court promptly issue an Order to the Los Angeles Municipal Court (Beverly Hills Judicial District, Division 5) and Los Angeles Superior Court (Appellate Department) commanding and directing that all proceedings be suspended and stayed or forthwith vacated pending a complete and full disposition of the instant appeal by the Court and pending further written order of this Court; and for such additional relief this Court deems necessary and proper in light of the gross constitutional injuries asserted and sustained by Appellant.

DATED: May 23, 1988

Respectfully submitted:

BY: /S/
EUGENE JOHN CARELLA, ESQ.
Appellan

DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE JOHN CARELLA, declare and state as follows:

1. That I am the Appellant herein.

2. That on April 11, 1988 I filed a Notice of Appeal to the United States Supreme Court pursuant to 28 U.S.C. Section 1257(2) on the basis of the per se constitutional invalidity of the California state penal statutes as more fully appear in the Jurisdictional Statement and Appendix on file with this Court in the subject appeal and incorporated into this motion as EXHIBITS "B" and "C".

3. That the questions I presented in the Jurisdictional Statement filed with the Court on May 17, 1988 demonstrate a gross and egregious violation of Appellant's constitutional rights guaranteed by the Sixth and Fourteenth Amendments, and Article 1, Section 9 and Section 10, and other gross constitutional infirmities and aberrations requiring this Court redress and take jurisdiction.

4. That the subject Appeal has been duly docketed by the Clerk of this Court and is pending for review before this Court, and I have been so advised by a clerk of this Court of its docketing on May 19, 1988.

5. That in the Notice of Appeal I filed April 11, 1988, I specifically demanded that the Clerk of Court possessed of the trial record forthwith prepare the Clerk's Record and certify it forthwith to this Court in accordance with the Rules of this Court.

EXHIBIT "A"

6. That the Notice of Appeal I filed attacks the state statutes as being unconstitutional and divested the Los Angeles Municipal Court (Beverly Hills Judicial District) and Los Angeles Superior Court (Appellate Department) of all jurisdiction over the subject litigation (see Rule 11 and Schempp v. School District, 184 F.Supp. 381, 3 FRD 2d 1034 when it was filed on April 11, 1988.

7. That I was ordered to appear on April 12, 1988 by the trial judge Judith Stein and advised that my "failure to appear on said date pursuant to the court's order would result in a warrant of arrest being served upon you [appellant]."

8. That I was compelled to appear at the Los Angeles Municipal Court Beverly Hills Judicial District, Division 5, and to comply with the Order of the court, and advised the trial court that a Notice of Appeal was filed with the United States Supreme Court divesting that court of all jurisdiction.

9. That said trial judge (even though possessing no jurisdiction and under threat of arrest) continued the matter on the remittitur of the Los Angeles Superior Court (Appellate Department) until May 27, 1988 at 2:00 P.M. (PST).

10. That Rule 11 of the Rules of this Court and interpretative notes confirm that the trial court and appellate department were preempted of all jurisdiction over the subject litigation on April 11, 1988 and have no jurisdiction to execute upon the judgment or direct further proceedings until this Court completely and fully disposes of the substantial constitutional challenges raised by Appellant in this Appeal.

22

(See, also Associated General Contractors v. Secretary of Commerce, 459 F.Supp. 766, 77 FRD 3d 31 (1977 Cal. C.D.).

11. That I have also apprised this Court that the proceedings and prosecution carried out against me are not only predicated upon unconstitutional state statutes grossly offensive to Appellant's constitutional rights [see Jurisdictional Statement], but constitute a conscious and deliberate criminal and malicious abuse of criminal process and proceedings against me, carried out by the intelligence apparatus of the United States government.

12. That I further show this Court that the state statutes whose validity are attacked in this Appeal and the complained-of constitutional errors and infirmities engendered thereunder stand in flagrant contradiction and affront to this Court's mandates of In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.E. 2d 368 (1970); Sandstrom vs. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979); Mullaney v. Williams, 421 U.S. 684, 45 S.Ct. 881, 44 L.Ed. 2d 508 (1975); Francis vs. Franklin, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985); Patterson vs. New York, 432 U.S. 197, 97 S.Ct. 2319, 5 L.E. 2d 281 (1977).

13. That I also show that my Sixth and Fourteenth Amendment rights have been irreparably injured and abridged by the aforereferenced criminal process invidiously commenced against me to destroy my livelihood, federal practice and reputation.

14. That I specifically invoke this Court's jurisdiction pursuant to 28 U.S.C. Section 2106 which states that:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order or require such further proceedings to be had "as may be just under the circumstances."

15. That I specifically commend to the Court's attention the broad jurisdiction conferred upon it by 28 U.S.C. Section 2106 and the complete and plenary jurisdiction conferred by such statute to criminal proceedings on appeal where there has been an egregious miscarriage of justice carried out against appellant, such as in the instant case. (See, Grosso v. United States, 390 U.S. 62, 19 L.Ed. 2d 906, 88 S.Ct. 709; Haynes v. United States, 390 U.S. 85, 19 L.Ed. 2d 923, 88 S.Ct. 722, United States v. Covington, 395 U.S. 5, 23 L.Ed. 2d 94, 90 S.Ct. 1559.)

16. That I further advise the Court that the plenary grant of jurisdiction conferred by 28 U.S.C. Section 2106 has been invoked by this Court to grant relief to an appellant not even requested by him in his appeal, where the relief was necessary in the interest of justice. (See, Forman v. United States, 361 U.S. 416, 4 L.Ed. 2d 412.)

17. That I state that in my reasoned and professionaly considered opinion and judgment, the constitutional questions I have presented in this Appeal will be disposed of and

concluded in a manner favorable to my cause and that this Court after careful and due deliberation will act to strike down and invalidate the state statutes challenged by me as unconstitutional on their face and the subject of this appeal.

18. That I will sustain further irreparable harm and injury if this Court permits the trial court to continue to carry forward with the void and malicious criminal proceedings against me in absence of all jurisdiction to do so, and the injuries to my person, livelihood, reputation, and the like already visited upon me will be further unnecessarily exacerbated and expanded.

19. That I have been subjected to the false misdemeanor criminal proceedings maliciously inspired against me and based upon constitutionally invalid state statutes for a period of three (3) years and I have been already falsely imprisoned for over sixty (60) days, pursuant to this false proceeding whose purpose, object and intent was to seek to discredit, smear and destroy my profession and background and integrity and to interfere with substantial litigations being prosecuted by me, which harm has already occurred.

20. That I complained to the State Bar of Colorado of which I have been a member since 1958, commencing back in 1980, of a concerted criminal interstate conspiracy directed against me and to the U. S. Department of Justice and Federal Bureau of Investigation, dating back to 1977 of a concerted criminal interstate racketeering conspiracy to destroy my federal practice because of my advocacies under various federal statutes and, particularly, the federal provisions of ERISA (Employee Retirement Income Security Act of 1974), and the

representation of various causes and clients before this Court and other federal forums.

21. That I am informed and thereupon state the subject false criminal proceedings and judgment now before this Court on appeal which pertain to a "rental car I received pursuant to a written rental contract" are an extension of, and relate to, the criminal interstate enterprise I commended to the U. S. Department of Justice and Federal Bureau of Investigation.

22. That I further state the statement of my personal livelihood and accomplishments attached herewith are true and correct statement of my professional livelihood and accreditation. (See EXHIBIT "A-1" attached herewith).

23. That I further state the subject proceedings instigated against me are false, vexatious, and calculated and designed to harm, oppress and disparage and discriminate against me and to collaterally disadvantage me and destroy my livelihood and profession and I specifically request that the Court act now to vacate, reverse, and set aside the false misdemeanor and judgment now before it on appeal and to invalidate the state statutes as unconstitutional and direct them to be stricken down.

24. That I specifically demand that this Court direct and order the trial transcripts of proceedings in Case No. M83675 be prepared by the Court Reporter and made a part of the Record on this Appeal and furnished to me at public expense.

25. That I specifically state the Transcripts completely "document" all the grounds for appeal presented (24 of them) presented to the Appellate Department of the Los Angeles Superior Court, and that I need the subject transcripts to vindicate all those issues raised by me on appeal before this Court.

26. That these vexatious proceedings now before this Court in combination with the aforereferenced conspiracy have "financially debilitated" me and I have been adjudged indigent by this Court. Accordingly, I am entitled to the Trial Transcripts as a matter of constitutional right and respectfully demand the transcripts be prepared, filed and furnished to me at public expense in their true and correct form. (See, In Re Armstrong, 126 C.A. 3d 565, 178 CR 902 (1981).

27. That I have been further advised that the trial judge and third parties acting in concert one with another are seeking to destroy, alter, and have spoiled the reporters notes and trial transcripts so as to cover up the criminal actions carried out against me by the intelligence community at the time of trial.

28. That I specifically invoke the Supremacy Clause of the United States Constitution as a bar and preemption of any further jurisdiction of the lower courts while this appeal is pending in this Court.

29. That I further believe and thereupon state the Administration has sought to cover up their criminal misconduct and undertakings and violations of my rights and person by falsely placing this entire proceeding under a "national security

blanket", thus depriving me of my constitutional rights to vindicate these heinous actions undertaken against me. I am the victim of a continuing federal crime and I demand this Court's intervention in having the crimes enjoined against me as it violates my federal constitutional and civil rights and my human rights in this country.

30. That I further state the United States Supreme Court [this Court] has obligatory jurisdiction to adjudicate the constitutional invalidity of the state statutes raised by me as Appellant in the aforereferenced appeal and the Court is required as a matter of law to decide the questions presented in this Appeal. (See, U.S. Ex Rel Wojtycha v. Hopkins, 517 F.2d 40 (1975).

I declare the foregoing is true and correct to the best of my knowledge and ability.

Executed on this 25 day of May 1988 in Los Angeles, California, under penalty of perjury.

BY: /s/
EUGENE J. CASELLA, ESQ.

PROFESSIONAL AND EDUCATIONAL VITAE

ROGER JOHN CASELLA

I. EDUCATIONAL ACHIEVEMENTS:

Elementary Education: High School

Darien High School, Darien, Connecticut.
Graduated 1961; Top 20%; Accepted for Study at Colgate University, University of Connecticut and Denison University; President of Student Council; National Leadership Conference; and Varsity Athletics.

College Education: Bachelor of Arts (B.A.)

Denison University, Granville, Ohio (1961 thru 1965)

Awarded Bachelor of Arts Degree (Political Science) - June 1965

Member: Phi Gamma Delta Social Fraternity.

Advanced Education: Doctor of Jurisprudence (J.D.)

University of Toledo School of Law (1965 thru 1968)
Awarded Juris Doctorate Degree (June 1968)

Licensed and Admitted to Practice Law:

State Supreme Court of Colorado (October 1968)
U. S. District Court of Colorado (October 1968)

II. VOCATIONAL EXPERIENCE: (Corporate and Business)

Mutual Life Insurance Company of New York (MONY)
Advanced Underwriting and Estate Planning Consultant (1968-1969): Primary technical, marketing, and consulting accountability for professional, business, and executive estate and insurance programs; Retirement and pension planning analysis; Advanced underwriting seminars (conducted at various locations throughout the country); Training responsibilities for MONY field underwriters (United States)

1740 Broadway, New York City, New York.

2.G

EXHIBIT "A-1" -13-

II. Continued --

U. S. Trust Company of New York
Financial Planning Consultant and Account Executive for Senior Executives of FORTUNE 500 Corporation (1969-1970): Primary consultant accountability for senior corporate executive clientele; direct corporate interface with senior executive echelon and development of comprehensive financial blueprints, including corporate-sponsored benefit programs and capital accumulation and estate conservation strategies for corporate executives.

45 Wall Street, New York City, New York.

Groesbeck Financial Advisors, Inc.
Senior Vice President of Corporation Division (1970-1973); Comprehensive, technical, marketing and consulting responsibilities for the financial planning requirements of senior corporate executives of FORTUNE 500 corporations. Managerial, supervisory and training responsibilities of technical and consulting support staff personnel (twenty (20) persons); accountability for the marketing, technical design and profitability of corporate financial services addressed to high-income corporate executives of FORTUNE 500 companies; monitoring of capital asset accumulation and estate strategies mandated by tax and investment changes.

1900 Avenue of the Stars, Century City
California 90067.

Edward W. Hay Associates (1973-1974)
Director of Marketing, Executive Financial Counselling Services: Exclusive and primary marketing; nationwide accountability for Edward W. Hay Associates executive financial counselling services designed to serve CEO's, presidents and other senior executives of FORTUNE 500 companies throughout the United States: Responsibilities for new market penetrations and business development.

Rittenhouse Square, Philadelphia, Pennsylvania.

II. Continued --

U. S. Trust Company of New York
Financial Planning Consultant and Account Executive for Senior Executives of FORTUNE 500 Corporation (1969-1970): Primary consultant accountability for senior corporate executive clientele; direct corporate interface with senior executive echelon and development of comprehensive financial blueprints, including corporate-sponsored benefit programs and capital accumulation and estate conservation strategies for corporate executives.

45 Wall Street, New York City, New York.

Groesbeck Financial Advisors, Inc.
Senior Vice President of Corporation Division (1970-1973); Comprehensive, technical, marketing and consulting responsibilities for the financial planning requirements of senior corporate executives of FORTUNE 500 corporations. Managerial, supervisory and training responsibilities of technical and consulting support staff personnel (twenty (20) persons); accountability for the marketing, technical design and profitability of corporate financial services addressed to high-income corporate executives of FORTUNE 500 companies; monitoring of capital asset accumulation and estate strategies mandated by tax and investment changes.

1900 Avenue of the Stars, Century City
California 90067.

Edward N. Hay Associates (1973-1974)
Director of Marketing, Executive Financial Counselling Services: Exclusive and primary marketing; nationwide accountability for Edward N. Hay Associates executive financial counselling services designed to serve CEO's, presidents and other senior executives of FORTUNE 500 companies throughout the United States: Responsibilities for new market penetrations and business development.

Rittenhouse Square, Philadelphia, Pennsylvania.

II. - Continued --

Inverness Planning Corporation (1974 thru 1976)
Vice President, Financial Planning Services - Corporate and Professional Executive Clientele): Direct consulting and marketing responsibilities for executive financial counselling programs and services to high-income corporate and professional executives; structuring and development of executive financial plans, including corporate-sponsored benefit programs (cash and non-cash); management incentive plans, investment plans (conventional portfolio and tax-advantaged plans); tax and estate conservation planning; liquidity analysis for high-income corporate and professional executives nationwide.

345 Park Avenue, New York City, New York

and

1880 Century Park East, Century City,

California 90067.

III. VOCATIONAL EXPERIENCE: (Legal and Professional)

Diversified, Independent Federal Legal Practice (1976-1988)

Federal Trial and Appellate Practice: Primary lead counsel and litigation responsibilities (trial, as well as appellate) for complex federal litigations under the Employee Retirement Income Security Act of 1974 (ERISA statute) and other labor and regulatory statutes); nationwide practice before various federal courts and federal administrative agencies; federal pension, labor, commercial, bad faith, malpractice and personal injury litigation expertise; sophisticated and extensive nationwide appellate skills and practice before various federal circuit courts in the United States and the U. S. Supreme Court; diversified and extensive trial preparation skills and considerable trial acumen in federal forums; preparation of appellate briefs, petitions and documents for various appellate courts and the U. S. Supreme Court.

IV. PERSONAL CHARACTERISTICS:

Distinguished professional acumen and expertise; strong and decisive professional and technical commitments; high personal integrity; intellectually decisive and accountable; positive client skills within executive

IV. PERSONAL CHARACTERISTIC (continued)

and professional societies; high intelligence quotient; self-motivated; confident and accepted at all professional and corporate echelons; outstanding written and verbal skills; high positive visibility within senior corporate and professional communities.

V. COMPENSATION BACKGROUND:

Prior to inception of independent legal practice in 1976, my compensation level was in the five figures plus incentive compensation and corporate perquisites (expense accounts, etc.) Current compensation is negotiable based upon the position, accountabilities and consideration of my extensive professional and business accomplishments, expertise and substantial legal and corporate experience and accomplishments.

VI. PROFESSIONAL ASSOCIATIONS, HONORS & MEMBERSHIPS:

A. Bar Memberships: (State and Federal)

State Supreme Court of Colorado
United States District Court of Colorado
United States Court of Appeals for the District of Columbia
United States Court of Appeals for the Fifth Circuit
Supreme Court of the United States
American Bar Association (past member for 12 years)
Association of Trial Lawyers of America
Practice in other federal trial and appellate forums in the United States.

B. Accreditations:

American Compensation Association (Honorary Member)
Presented Award of Distinction

Who's Who In American Law (Distinguished member)
(1987-1988, 5th Edition)

Who's Who In California (Distinguished member)
(1987-1988, 17th Edition)

VI. Continued --

B. Accreditations - continued

Who's Who In California (1988)
(Distinguished member)

International Platform Association (1988)
(Participating Member)

Who's Who In Emerging Leaders (1988)
(Selected Member)

Selected Delegate to the Dwight Eisenhower
Ambassador to Ambassador Program (1988)

Who's Who in the World, 9th Ed. (1988)
(Selected Member)

VII. REFERENCES UPON REQUEST:

Business, personal and professional references will be furnished upon request.

BY: _____
EUGENE JOHN CARELLA

P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

CERTIFICATE OF SERVICE

I, Eugene J. Carella, the undersigned, hereby certify and swear that on this____day of May 1988 I served a true and correct copy of the within MOTION TO VACATE, SET ASIDE, AND REVERSE JUDGMENT AND ALTERNATIVE RELIEF on all parties of record, interested persons, and Clerk of the Los Angeles Municipal Court, Beverly Hills Judicial District, and Clerk of the Los Angeles Superior Court Appellate Department, by first class mail, postage-prepaid, addressed as follows:

Ira Reiner
District Attorney
849 S. Broadway
11th Floor
Los Angeles, CA 90012

John Van de Kamp
Attorney General
State of California
6000 State Building
350 McAllister Street
San Francisco, CA 94102

Judith Stein, Judge
Los Angeles Municipal Court
Beverly Hills Judicial District
9355 Burton Way
Beverly Hills, CA 90210

Fred Woods, Jack Newman,
Alfred Margolis, Robert
Robertson, Judges
Los Angeles Superior Court
Appellate Department
111 N. Hill St., Rm. 607
Los Angeles, CA 90017

Paul Woods
Air Bail Bonds
121 E. Regent St.
Inglewood, CA 90301

/S/
Eugene J. Carella

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Eugene J. Carella
ATTORNEY AT LAW

August 22, 1988

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: Carella v. California, No. 87-6997 [Appeal and Motion to Vacate, Set Aside and Reverse Judgment]

Dear Mr. Spaniol:

This letter is to acknowledge receipt of your August 4, 1988 letter responding to my July 18, 1988 letter to your office. Copies of the aforereferenced are enclosed for your convenience.

To avoid any confusion or uncertainty regarding the treatment of my Appeal No. 87-6997 and my Motion to Vacate, Set Aside and Reverse Judgment and Alternative Relief filed May 26, 1988, I am summarizing the following representations made by you and your office:

(1) That the matter of Eugene J. Carella vs. People of the State of California was lawfully brought before the Supreme Court for review pursuant to a Notice of Appeal timely filed on April 11, 1988.

(2) That on May 17, 1988, the Jurisdictional Statement was filed in the above-entitled cause docketed as an appeal on May 17, 1988.

(3) That on May 26, 1988, a Motion to Vacate, Set Aside and Reverse Judgment made pursuant to 28 U.S.C. § 2106 was received and filed with the Court.

(4) That no motions, oppositions or responses of any kind have been made, lodged or filed by any of the appellees to the Appeal, the motions on file, or the Jurisdictional Statement on file with the Court and the time for making any such response or opposition has long since expired.

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(5) That you have specifically and expressly represented that Public Law 100-352 (S-952) on the mandatory juridiction of the Court does not apply to my appeal, inasmuch as the "new law excepts appeals currently pending in the Court from its coverage."

(6) That the Notice of Appeal filed by me on April 11, 1988, specifically recites that "said appeal is statutorily authorized and mandated by 28 U.S.C. § 1257(2) and otherwise timely brought" and it is unequivocal that the mandatory jurisdiction provisions governing and applicable federal statutes compel that the Supreme Court adjudicate the challenge of the constitutional invalidity I have made to the two (2) state statutes under which I have been falsely arrested, imprisoned and maliciously prosecuted. That is to say, Congress in 28 U.S.C. § 1257(2) gives the Court no discretion to refuse to act upon and answer any constitutional challenge to the California statutes whose invalidity has been aggressively attacked by me and when the state courts have held for validity.

(7) That you have represented to me that my appeal, my jurisdictional statement, my motion to proceed in forma pauperis, and my motion to vacate, set aside, and reverse judgment and alternative relief have all been forwarded to each of the justices of the United States Supreme Court in June 1988 notwithstanding my express demand that the motion to vacate, set aside and reverse be transmitted to the Court last term.

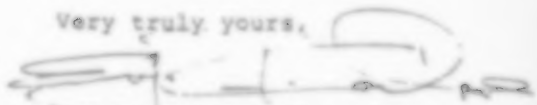
(8) That your office has received correspondence from me regarding acknowledgment upon receipt of the record from the lower state court, which record I dutifully requested be forthwith transmitted to your office in accordance with the Rules of Court. As of today's date, I have no confirming advices from your office or the lower court that the Record has, in fact, been forwarded and transmitted to the Supreme Court. Accordingly, I will be making a Motion to Compel Transmission of the Record and for sanctions.

Again, I reiterate, that I am the victim of a continuing federal crime, interstate in scope, whose purpose is to deprive and deny me my federal constitutional and civil rights and to destroy my life, liberty, freedoms and property orchestrated by the United States intelligence agencies in combination with other third persons, and

I am demanding intervention of the Supreme Court to thwart any further violations of ry person and rights.

I remain,

Very truly yours,



EUGENE JOHN CARELLA, ESQ.

P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

Appellant

[A Colorado resident]

/p

ENCLOSURES

cc: Files (5); RCO

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.
CLERK OF THE COURT

September 2, 1988

Eugene John Carella, Esq.
P. O. Box 67292
Century City
Los Angeles, California 90067-0292

RE: Carella v. California, No. 87-6997

Dear Mr. Carella:

In reply to your further inquiry of August 22, the Court has requested that the appellee in the above case, the State of California, file a response. That response is due on September 30, 1988. As a result, consideration of the case by the Court in conference will be delayed pending receipt of the response.

With regard to the lower court record, it is to be held by the clerk of the lower court pending an order or request from this Court that it be transmitted. If the Court wants the record pending action on your jurisdictional statement, we will send for it.

At this stage the Court will be reviewing your jurisdictional statement to determine whether the Court finds that it does in fact have jurisdiction. If the Court so determines, it will note probable jurisdictional or postpone that issue until the argument of your case on the merits. Thereupon you will have an opportunity to file a brief on the merits in accordance with Rule 34. Otherwise, the Court may dismiss your appeal.

When you are served with a copy of the response by the State of California, you may file a reply brief, although it is not required. In any event, the case will be listed for review by the Court in Conference within two to four weeks after the response is received. Any reply brief should therefore reach us as soon as possible after receipt of the State's response.

Sincerely yours,

Joseph F. Spaniol, Jr.
Clerk

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.
CLERK OF THE COURT

August 31, 1988

Harry B. Sondheim, Esq.
Arnold T. Guminski
District Attorney's Office
Los Angeles County
849 S. Broadway
Los Angeles, California 90014

RE: Eugene John Carella v. California, No. 87-6997

Gentlemen:

On May 17, 1988, a jurisdictional statement in the above case was filed in this Court to review an order of the Appellate Department of the Superior Court of California, County of Los Angeles (No. CRA 24001), dated February 3, 1988.

The Court has directed this office to request that a response be filed in this case. The response in appeals normally takes the form of a motion to dismiss or affirm as provided for under Rule 16 of the rules of this Court.

Ten typewritten or otherwise reproduced copies of your response, together with proof of service thereof, should reach this office on or before September 30, 1988.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

Joseph F. Spaniol, Jr.
Clerk

cc: Eugene John Carella, Esq.
The Hon. John Van de Kamp
Attorney General

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EUGENE JOHN CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, California 90067-0292

Appellant

ORIGINAL FILED
JAN 2 6 1988
COUNTY CLERK

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

EUGENE JOHN CARELLA, Appellant, vs. PEOPLE OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. CRA 24001 LAMC M 83675 APPELLANT'S MOTION AND DEMAND FOR REPORTERS TRANSCRIPTS AT PUBLIC EXPENSE; DECLARATION OF EUGENE J. CARELLA; MEMORANDUM OF POINTS AND AUTHORITIES For Immediate Action

TO: JUDGES OF APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, CENTRAL DISTRICT

COMES NOW, EUGENE JOHN CARELLA, ESQ., Appellant herein, without waiver of disqualification to the Judges of the Appellate Department of the Superior Court of California, County of Los Angeles, Central District, and pursuant to the Rules of Court and the Supreme Court mandate of In Re Armstrong, 126 CA 3d 565, 178 CR 902 (1981), and moves this Court for an Order directing that the entire Transcripts of Proceedings in the false and criminally-inspired

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and orchestrated trial proceedings, the subject of this appeal, be prepared and provided to Appellant at public expense and concurrently filed with the Appellate Department of the Superior Court to be used in the adjudication of Appellant's appeal now pending before this Court.

In support of the subject motion, Appellant shows the Court the imperative and indisputable need to have verbatim reporters' transcripts to document the gross criminal irregularities carried out against Appellant and the necessity to document a total failure and insufficiency of evidence by the People and reprehensible and gross prosecutorial and trial court prejudice, misconduct and fraud used to secure the false judgment and verdict now before this Court.

Appellant, in addition to making a prima facie showing for the need for said reporters' transcripts, also shows his Affidavit of Present Financial Indigency identified as EXHIBIT "A-1" and attached herewith and incorporated and made a part of his Declaration (EXHIBIT "A") documenting his incapacity to pay for said transcripts. That failure to accord Appellant a reporter's transcript and made a part of the Record on Appeal will result in irreparable injury to Appellant in the disposition of his appeal not yet submitted to this Court, and will grossly abridge his constitutional right to due process of law, as the certified "settled statement" prepared

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by the trial court is a fraudulent, misrepresentation of the proceedings and evidence adduced at trial; that the purpose and objective of this appellate court will also be served by the preparation and filing of the Reporters' Transcripts, as said transcripts set forth "fairly and accurately" the evidence and proceedings below and fully demonstrate a total abrogation of this Appellant's constitutional rights at time of trial, as is more completely demonstrated in the grounds for appeal.

Said motion is based upon all papers, pleadings, documents, and the like on file herein--together with the Declaration of Appellant, identified as Exhibit "A" and the Memorandum of Points and Authorities attached herewith.

DATED: January 22, 1988

BY: _____
EUGENE JOHN CAPELLA

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EXHIBIT A

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DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE J. CARELLA, declare and state as follows:

1. That I am the Appellant herein-defendant below.

2. That I am herewith and hereby specifically demanding that the Reporters' Transcript of Trial Proceedings, the subject of this appeal, be furnished to me and made a part of the Record on Appeal and filed with this Court forthwith.

3. That a true and correct copy of a Proposed Statement on Appeal and Notice to Prepare and Incorporate Reporters' Transcripts in Statement which was filed with the trial court on or about June 14, 1986 is identified as EXHIBIT "A-1" and attached herewith, consisting of nine (9) pages.

4. That these grounds for appeal have been certified by the trial court in the Statement on Appeal.

5. That a review of said Grounds for Appeal demonstrates twenty-four (24) separate grounds for appeal, several of which assert gross prosecutorial and trial court misconduct, fraud and prejudice which can only be evidenced by verbatim reporters' transcripts. (Grounds Nos. 7, 14, 15, 17, 18 and 22).

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EXHIBIT "A"

6. That Appellant further urges this Court to throw out the bogus and false judgment and conviction of the trial court on the grounds of a "complete insufficiency of evidence" and failure of proof by the People (Ground No. 10, 18, 21) and that the trial court failed to allow and admit important evidence to support Appellant's defense (Ground No. 20); and committed gross irregularities and errors of constitutional proportion regarding the giving of prejudicial jury instruction (Ground No. 6); and refused to make other mandatory jury instructions required by her as a matter of law to protect Appellant's constitutional rights to a fair trial (Ground No. 5).

7. That the "settled statement" certified by the trial judge is gross and material misrepresentation of the evidence and proceedings occurring in the trial court, and is also lacking its requirement to set forth "concise factual summaries of each of the proceedings before the court from arraignment to judgment, including a recitation of the manner in which each of defendant's constitutional rights were protected." See, People v. Jenkins, 55 CA 3d, Supp. 55, 127, CR. 870 (1976).

8. That I have been the victim of a common enterprise of criminal racketeering utilizing various state and federal courts throughout the United States to deprive me of my attorney fees, costs, and contingency fees earned by and owed to me, and to destroy my livelihood, person, and

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federal practice and reputation.

9. That the subject prosecution, the subject of this appeal, is but "one component" of this invidious criminal racketeering conspiracy orchestrated by state and federal officials.

10. That I am a distinguished legal advocate and recognized as such in Who's Who in American Law because of my contributions to the legal profession and that I was arguing a case in the United States District Court for the Central District of California on June 18, 1985 -- one (1) week before the false arrest.

11. That on or about January 20, 1988, a few days ago, I received word from the United States Supreme Court that my attempts to have the United States Court of Appeals for the Ninth Circuit act to grant me attorneys fees in this matter earned and owed to me and represented to be paid to me (now exceeding $200,000) was rejected. (A copy of said Supreme Court Order is identified as EXHIBIT "A-2" and attached herewith.

12. That I had fully intended to receive these monies, inasmuch as the District Court for the Central District of California authorized an "attorney lien" to protect my quantum meruit legal services in a successful ERISA (Employee Retirement Income Act of 1974) litigation

I conducted against General Electric Company, Inc., et al. on behalf of an asbestosis-affected pension plan beneficiary who had been cheated out of all his disability and retirement benefits, but now enjoys a substantial settlement on account of my legal efforts and time expended on his behalf.

13. That I have expended well in excess of $200,000.00 of monies (pro bono out-of-pocket monies) and in excess of $1 million of billable time on behalf of said client's seeking redress in the federal court system.

14. That in view of the Supreme Court's denial on January 11, 1987 directing that my fees be paid to me, I am now at this time financially incapacitated and indigent, having exhausted all of my resources on behalf of client causes.

15. That the enclosed "Declaration of Financial Condition" in support of my demand for a Reporter's Transcript at public expense is a true and correct statement of my financial condition at this time and I am unable to pay for the Reporters' Transcripts which I have been advised by the Court Reporter would be between $5,000-6,000.

16. That the Reporters' Transcripts of Proceedings are material and essential to adjudicate my appeal and will greatly assist the Court in its appellate decision-making and ensure the interest of justice.

17. That I further state that the subject trial proceedings before this Court were in furtherance of a criminal racketeering conspiracy authorized by the highest members of the Reagan Administration and done with the knowledge, consent and approval and affirmation of Ronald Reagan personally, together with other high-ranking members of the Administration and carried out against me--including, but not limited to, Edwin Meese, William French Smith and William Webster.

18. That it is <u>impossible</u> for me to have a fair appeal, hearing or fair adjudication or fair trial without the preparation of the Reporters' Transcripts at public expense and I have made a <u>prima facie</u> showing for their need before this appeal is submitted to the Court for adjudication.

19. That the prospect for my financial condition to improve in the next six to twelve months is extremely marginal, as the conspiracy to deprive me of all my legal fees and earnings and bar practice has been further amplified and exacerbated by the subject malicious false proceedings.

20. That there is no plausible reason the People can advance to deny the motion, inasmuch as I have alleged a/"misuse of criminal trial court proceedings" which Ira Reiner has a duty to investigate, and said trial transcripts demonstrate criminality in the conduct of the proceedings against me.

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21. That I further specifically request that the Court direct Robert Morse, Court Reporter, to forthwith prepare the transcripts of trial proceedings set forth i. Pages 8, 9 of EXHIBIT "A-1" attached herewith.

22. That I further request that oral argument on the appeal scheduled for January 28, 1988 be continued for a period of sixty (60) days to allow the Court to receive and review the transcripts referenced herein.

I declare that the foregoing is true and correct to the best of my knowledge and ability.

Executed on this 25 day of January 1988 in Los Angeles, California.

EUGENE JOHN CARELLA, ESQ.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

Appellant, EUGENE J. CARELLA, ESQ., has alleged that the trial court proceedings and judgment of misdemeanor conviction for alleged "theft" of a rental automobile furnished to him pursuant to a written rental contract was in furtherance of a racketeering conspiracy designed to destroy Appellant's federal legal practice, to cheat him of legal fees and monies owed to him, to destroy his lawyering credentials, and to cover up high-level Administration criminal misconduct against him.

The Appellant has recited over twenty-four (24) grounds for appeal, requiring that the misdemeanor judgment and conviction be "thrown out the window" and vacated as a matter of law forthwith. The "settled statement" certified by the trial judge -- whose disqualification is one of the grounds for appeal -- is a rank fraud and grossly fails to state the evidence "fairly and truthfully" and is otherwise an inferior, ill-drafted and self-serving document not in conformity with the Rules of Court, Rule 183, et seq., or mandates governing the requirements of the settled statement. See, People v. Jenkins, supra. Furthermore, Appellant has now advised this Court that within the last two weeks he has learned that the Supreme Court has refused to act to overturn Judge Anthony Kennedy's Order cheating Appellant Attorney Carella of attorney

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fees owed to him exceeding $200,000 as a result of his successful legal representation of a client against General Electric Company, Inc. for asbestosis disability. (Note Appellant was in the U. S. District Court at 312 N. Spring Street on June 18, 1985 -- one week before the subject false arrest for taking "a rental car," seeking to collect these very same legal fees.) Appellant has stated twenty-four (24) founds for appeal which demonstrate insufficient evidence, prosecutorial misconduct, fraud and conspiracy in jury selection, and gross misconduct in trial court's giving of "prejudicial jury instructions" and her refusal to make others. The grounds for appeal can only be adjudicated on the basis of verbatim reporters' transcripts. Appellant has made an overwhelming showing of the need for a verbatim reporters' transcript, and there is no way the People can overcome said showing or deny Appellant a verbatim reporters' transcripts without further violating Appellant's constitutional and civil rights and having this Court act to throw out the false conviction. See, March v. Municipal Court, 7 C.3d 422, 102 CR 597 (1972); Mayer v. Chicago, 404 U.S. 189 (1971); People v. Hosner, 15 C.3d 60, 64, 123 CR 381, 384 (1975).

Further, Appellant's current financial status as an indigent determines and activates his right to receive a transcript prepared at public expense automatically. Moreover, since Appellant has recited twenty-four (24) grounds for appeal of enormous breadth and scope, anything other than a complete reporters' transcript would be inadequate, under March,

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supra, and any doubt that a complete transcript should be ordered and prepared, should be resolved in Appellant's favor.

The law in this State is crystal clear. Appellants, such as appellant herein, who are indigent must be provided a verbatim record and reporters' transcripts of proceedings for support, documentation and adjudication of his appeal upon request or demand, where he seeks to appeal a misdemeanor conviction. This has been the law in California since 1982 up and to the present date. In Re Armstrong, 126 CA 3d 565, 178 CR 902.

The grounds for appeal recited by Appellant in his Proposed Statement on Appeal certified by the trial court make a reporter's transcript absolutely imperative to ensuring Appellant's due process and equal protection guaranteed by the Fourteenth Amendment of the U. S. Constitution and the Constitution of this State.

CONCLUSION

FOR ALL THE REASONS advanced herein, Appellant respectfully prays his motion for Reporters' Transcripts at public expense be granted forthwith, and that the oral argument in the above-referenced appeal be continued for at least sixty (60) days to allow Robert Morse, Court Reporter, to prepare the actual reporters' transcripts.

Let an Order issue that Robert Morse prepare a

reporters transcript of the proceedings identified in Appellant's Notice to Prepare Transcripts filed June 14, 1986 (Pages 8, 9 of Exhibit "A-1" attached) and that said expense be borne by the State of California and that the oral argument scheduled in the subject appeal be continued for a period of sixty (60) days from January 28, 1988 to March 29, 1988; and for such further and additional relief the Court deems necessary and proper.

DATED: January 25, 1988

BY: _____
EUGENE JOHN CARELLA, ESQ.
Appellant

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EUGENE JOHN CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

Appellant/Defendant

June 14 1986

IN THE MUNICIPAL COURT OF BEVERLY HILLS JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Respondent/Plaintiff vs. EUGENE JOHN CARELLA, Appellant/Defendant.	APPEAL NO. CRA 24001 LAMC No. M 83675 APPELLANT'S PROPOSED STATEMENT ON APPEAL AND NOTICE PREPARE AND INCORPORATE REPORTERS TRANSCRIPT IN STATEMENT.

COMES NOW EUGENE JOHN CARELLA, ESQ., pursuant to the Rules of Court, and does respectfully submit his within Proposed Statement on Appeal, together with his Notice to Prepare and Incorporate Reporters Transcript and Grounds for Appeal, more fully identified as EXHIBIT "A" attached herewith, and specifica prays that the Presiding Judge or Acting Presiding Judge forthwi certify said proposed statement and take such further action necessary to insure the interest of justice in light of Appellan continuing challenge and disqualification of the trial judge Judith O. Stein because of her gross bias, prejudice, ill will and hatred demonstrated against Appellant and in favor of the Pe

EXHIBIT "A"

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Appellant also prays such further and additional relief necessary and proper in light of the circumstances presented herein, and to further supplement the subject proposed statement.

DATED: June 14, 1986

BY: _____
EUGENE JOHN CARELLA, ESQ.
Appellant

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PROPOSED STATEMENT

Appellant specifically incorporates all those grounds for appeal hereinafter set forth, identified as Grounds 1 thru 23, and further specifically incorporates all those reporters transcripts of proceedings in accordance with his notice to prepare reporters transcript made a part hereof, and such further additions in accordance with law.

GROUNDS ON APPEAL

1. Appellant's right to a speedy trial guaranteed by state and federal constitutions was grossly abridged by the Court's denial of Appellant's Motion for Mandatory Dismissal pursuant to Section 1382 of the Penal Code, and said denial constitutes reversible error.

2. The trial court's failure to stand recused and disqualified in accordance with Appellant's Disqualification Petition and its failure to permit Petition to be filed or lodged constitutes reversible error.

3. Trial court's extreme and gross bias and hatred against Appellant and in favor of The People--including threats of oppression, incarceration and punitive fines--deprived Appellant his right to receive a fair trial and other constitutio rights.

4. Court's refusal to dismiss the Complaint and declare the statutory presumptions contained in Sec. 10855 of Vehicle Code and 484 of the Penal Code unconstitutional constitutes an abuse of discretion

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and reversible error.

5. Trial court's refusal and failure to instruct the jury in accordance with Appellant's Written Jury Instructions and Charges filed by Appellant on March 18, 1986 and its failure to make any sua sponte instructions regarding Appellant' defense that "legal title and permission to the subject vehicle was entrusted to him pursuant to written contract" constitutes infirming reversible error.

6. Trial court's instruction to the jury over Appellant's continuing objection with respect to the presumptions contained in Vehicle Code Sec. 10855 and Penal Code Sec. 484, deprived Appellant of his constitutional rights to a jury trial and fair trial and otherwise constitutes fatal reversible error.

7. Trial court's refusal to admonish and prohibit the prosecution for its misconduct in presenting prejudicial charts and graphs not in evidence to the jury and prosecutor's referenc to such documents through the course of the trial and other prosecutorial misconduct constitutes infirming reversible error and denied Appellant's right to a fair trial.

8. Trial court's failure to grant Appellant's Motion to Dismiss on the grounds that the subject criminal proceeding is a prosecution for a "civil debt", for enforcement of a "civil contract," constitutes reversible error.

9. The court's refusal to dismiss the complaint on the grounds that the statutes in question are void for vagueness and

ambiguity thereby denying Appellant his due process rights constituting reversible error.

10. Trial court's refusal to grant Appellant's Motion to Dismiss at close of People's case on the basis of insufficient evidence constitutes reversible error.

11. Trial court's refusal to grant Appellant's Motion for Mistrial and for Motion for Judgment Notwithstanding the Verdict constitute prejudicial, reversible error and gross abuse of discretion.

12. Trial court's refusal to strike People's Jury Instructions or to Accord Appellant Hearing on Jury Instructions constituted prejudicial reversible error and abuse of discretion.

13. Trial court's refusal to grant Appellant a Probation Hearing and accord him a Pre-Sentencing Report after it had set the matter for probation hearing on May 13, 1986 -- together with arbitrary and capricious pre-sentencing conditions and revocation of Appellant's own recognizance status and placing him under excessive bail and physical danger constituted a denial of due process of law and is reversible error.

14. Trial court's denial of Appellant's Motion for Judgment in Arrest of Proceedings for Fraud and Trial Irregularities including jury tamperi and constituted reversible error.

15. Court's failure to properly arraign Appellant on the

subject charges--together with the failure of the Court to properly discharge its duties to Appellant at arraignment of sentencing and judgment denied Appellant his right to a fair trial.

16. Trial court's refusal to permit inquiry and questioning by Appellant into juror pool and the undue/restriction voir dire into bias and conflict of interests of jurors constitutes infirming reversible error.

17. The trial court ex parte, in collusion with The People, conspired to fix the jury pool and jurors assigned to the case, and the jury verdict entered on March 24, 1986 was secured by fraud, trickery, deceit and conspiracy between the trial court and The People and various jurors and alternate jurors.

18. The verdict of the jury entered on March 26, 1986 is unsupported by any evidence and was the product of a common enterprise to harm Appellant irreparably and his reputation and livelihood and secured by fraud.

19. The trial court's denial of Appellant's Motion For a New Trial constituted infirming reversible error.

20. The trial court's failure to admit Appellant's evidentiary exhibits and/or Take Mandatory Judicial Notice of Legal Proceedings in which Appellant was participating in California and other forums constituted infirming reversible erro

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21. Trial court's refusal to Strike People's Evidentiary Exhibits that were NOT properly authenticated constituted infirming reversible error and should have been suppressed.

22. The trial court's imposition of sentencing Appellant to six (6) months in County Jail with no probation--together with three (3) years of parole--is a cruel, unusual punishment and in excess of the statute and unconstitutional, and must be vacated forthwith, especially in light of the fraud associated with the subject sentencing to prevent Appellant from prosecuting other matters as an attorney and/or plaintiff.

23. For such further grounds as appear from the Transcript of Evidence to be filed herein, including, but not limited to the fact that the subject arrest and consequent proceedings were a fraud, nullity and carried out in total absence of any probable cause and trial court's refusal to dismiss proceedings were in concert with third parties to harm and falsely imprison Appellant.

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NOTICE TO PREPARE REPORTERS TRANSCRIPT

As part of his Proposed Statement, Appellant specifically gives notice to prepare and designate the following reporters transcripts and requests that said evidence be prepared, certified, and made a part of his statement herein:

1) All those pre-trial proceedings in the subject litigation occurring on June 27, 1985 in Division IV.

2) All those pre-trial proceedings in the subject litigation occurring on July 1, 1985 in Division IV.

3) All those pre-trial proceedings in the subject litigation occurring on August 9, 1985 in Division IV.

4) All those pre-trial proceedings in the subject litigation occurring on October 20, 1985 in Division IV.

5) All those pre-trial proceedings in the subject litigation occurring on December 2, 1985 in Division IV and Division V.

6) All those pre-trial proceedings in the subject litigation occurring on December 16, 1985 in Division V.

7) All those pre-trial proceedings in the subject litigation occurring on January 12 and January 13, 1986 in Division V.

8) All those pre-trial proceedings occurring in the subject litigation in Division II on March 7, 1986.

9) All those trial proceedings occurring in the subject litigation commencing on March 17, 1986 in Division V before Judith O. Stein with jury selection and voir dire and trial proceedings on March 18, 1986, March 19, 1986, March 20, 1986, March 21, 1986 and March 24, 1986.

10) All those proceedings occurring in the subject litigation on March 28, 1986 in Division V.

11) All those proceedings occurring in the subject litigation on April 4, 1986 in Division V.

12) All those proceedings occurring in the subject litigation on April 7, 1986 and April 8, 1986 in Division V.

DATED: June 14, 1986

BY: _____
EUGENE J. CARELLA, ESQ.
APPELLANT

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OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

January 11, 1988

Mr. Eugene John Carella
P. O. Box 67292
Los Angeles, CA 90067-0292

Re: Eugene J. Carella v. Billy M. Cooper
A-497

Dear Ms. Carella:

Please be advised that our letter to you dated December 29, 1987 was in error. Kindly note that your application to continue a stay pending the timely filing and disposition of a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who has endorsed thereon the following:

"Denied - SOC
12/24/87"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By Edward L. Turner (

Edward L. Turner, Jr.
Assistant Clerk

kz
cc: Peter James, Esq.
Henry Giler, Esq.
Raoul Y. Roth, Esq.

EXHIBIT "A-2" 84

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RETURN TO:

SUPERIOR COURT, APPELLATE DEPT.
ROOM 607, COUNTY COURTHOUSE
111 NORTH HILL STREET
LOS ANGELES, CA 90012

THIS FORM MUST BE KEPT CONFIDENTIAL

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
Eugene John Carella,
Defendant and Appellant.

Superior Court No. CR A 24001
Trial Court No. M 83675
Beverly Hills
(NAME OF MUNICIPAL COURT)

REQUEST FOR TRANSCRIPT AT PUBLIC EXPENSE AND DECLARATION OF FINANCIAL CONDITION

I request an order of the court directing preparation of Reporters' Transcripts at public/~~private~~ expense in my [appeal to the Superior Court] No 24001 filed on APRIL 7, 1986.

In support of the foregoing request, I declare:

1. My full name is Eugene (FIRST) John (MIDDLE) Carella (LAST)
2. My address is P.O. BOX 67292 (STREET NUMBER) Century City (STREET) (APT. NUMBER)
Los Angeles (CITY) California (STATE) 90067 (ZIP CODE) (PHONE NUMBER)
3. I am a person who does not have the money for Reporters' Transcripts without suffering money needed for the necessities of life and I do not have credit to borrow the needed sum.

[IMPORTANT: This document must be answered fully and honestly. Leaving blank spaces will result in a rejection or return for completion.] Put "none" or "not applicable" in all spaces not otherwise filled in.

1.5

EXHIBIT "A-3"

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D. *INCOME OTHER THAN EMPLOYMENT INCOME*

	Yourself	Spouse
Any other income. (List all sources of income here, other than wages, including aid for dependent children; Social Security; rents; dividends; interest; pensions; trusts; or money from any source.)		
1. None		
2.		
3.		

E. *ASSETS*

				Yourself	Spouse
Savings Accounts				None	
Checking Accounts				None	
Credit Union(s)				None	
Bonds and Stocks				None	
Home (market value)	None				
Home loan balance	( )		NET:	None	
Other real estate (market value)	None				
Loan balance	( )		NET:	None	
Furniture					
Vehicles (net value after deducting loan balances)					
Auto(s)	(make)	(year)		None	
	(make)	(year)			
Truck(s)	(make)	(year)		None	
Motorcycle(s)	(make)	(year)		None	
Other property (boats, etc.)				None	
Retirement fund – vested interest				None	
TOTAL ASSETS				None	

///

6.

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4. The names and ages of my dependents are:

Name	Age
None	

5. Crime which I was convicted of: Theft of motor vehicle

Nature: automobile furnished to me pursuant to rental contract

6. Name and address of attorney who represented me at the trial was:

N/A

7. Describe briefly what attempts you have made to find a lawyer to handle this appeal for you, and why you cannot get your own lawyer. N/A

I declare under penalty of perjury that the foregoing is true, and that this declaration was executed on January 25, 1989, at Los Angeles, California.

Evgen Jon Cmaus
(Type or print name)

(Signature of applicant)

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this the___day of January 1988 I served a true copy of Appellant's Motion and Demand for Reporters Transcripts at Public Expense; Declaration of Eugene J. Carella; Memorandum of Points and Authorities on all parties of record by first class mail, postage prepaid, in Los Angeles, California, on the following:

IRAN REINER
District Attorney
849 S. Broadway
11th Floor
Los Angeles, CA 90014

L-8

FILED

JAN 26 1988

FRANK A. MCGUIRE, County Clerk

Alan Handley

BY ALAN HANDLEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs EUGENE JOHN CARELLA, Defendant and Appellant.	Superior Court No. CR A 24001 Municipal Court of the Beverly Hills Judicial Dist. No. M 83675

ORDER

THE COURT*

Appellant's Motion and Demand for Reporters Transcripts at Public Expense, filed January 26, 1988, having been read and fully considered,

IT IS ORDERED that said motion and demand is hereby denied.

Margolis Woods

* Before Margolis, P. J. and Woods, J.

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P 725 445 079

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED

FOR DOMESTIC MAIL ONLY

Sent to	Richard Bretzling
	Special Agent-In-Charge
	FBI
Street and No.	11000 Wilshire Blvd.
P.O., State and ZIP Code	Los Angeles, CA. 90024
Postage	$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$

PS Form 3800, June 1985

SENDER: Complete items 1, 2, 3, and 4.

Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fee.

1. ☒ Show to whom, date and address of delivery.
2. ☐ Restricted Delivery.

3. Article Addressed to:
Richard Bretzling, Special Agent-in-Charge, Federal Bureau of Investigation, 11000 Wilshire Blvd., Los Angeles, CA 90024

4. Type of Service:
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail

Article Number
P 725 445 079

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature - Addressee
X

6. Signature - Agent
X

7. Date of Delivery

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3811, July 1983 DOMESTIC RETURN RECEIPT

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Eugene J. Canella
ATTORNEY AT LAW

March 10, 1988

Certified No P 725 544 507

Richard Bretzling
Special Agent-in-Charge
Federal Bureau of Investigation
11000 Wilshire Boulevard
Los Angeles, California 90024

Re: Criminal Abuse of Judicial Process

Dear Mr. Bretzling:

On February 26, 1988, I contacted your office concerning a continuing criminal conspiracy carried out by the Central Intelligence Agency, National Security Council, and various departments of the United States Department of Justice to have me falsely arrested, falsely convicted and falsely imprisoned on a misdemeanor charge emanating from a rental of a rental car pursuant to a written rental contract in March 1985. I have also been in touch with Mr. Pence, your counterpart in the Denver, Colorado office and Mr. Richard Schusher, special agent, assigned to investigate the criminal misuse of the Colorado State Bar disciplinary proceedings in Denver, Colorado seeking to further injure my career, reputation, professional licenses to practice law in furtherance of this criminal civil rights and racketeering conspiracy directed against me of which your Washington, D.C. main office has been apprised previously. I had visited your offices back in 1976-77 after the filing of major ERISA (Employee Retirement Income Security Act of 1974) litigation when I encountered destruction of various other litigations seeking redress for various harms on behalf of my clients and, unfortunately, myself for my commitment to implementing this statute on behalf of my clients, and also filed personal written complaints with your Westwood office in December 1979, May 1981, June 1981, September 1983 and made other contacts therewith and with the U. S. Department of Justice.

I am enclosing various documents and papers which relate to a criminal interference in the adjudication of my cause on appeal from my false arrest and false conviction and, specifically, the "fixing and tampering" of proceedings by Superior Court judges to deny me proper access and equal protection and due process of law accorded others in the legal system. Judges Newman, Woods, Robertson, Margolis and Clerk Alan Hardy as well as various Court of Appeal judges, Second Appellate District, Fukuto and Gates, in particular. There is now a criminal abrogation

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of the disqualification statute of this State in furtherance of the criminal racketeering conspiracy against me, with full knowledge of this fact being carried out by the aforenamed judges and others. I am requesting your office's intervention to stop this gross criminal perversion of our federal laws and the Constitution.

I will contact you to arrange for a personal visit with you to further embellish these most serious matters.

Very truly yours,

Eugene J. Carella, Esq.
a Colorado Attorney
P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

cc: Files (4); RCO

Enclosures

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Eugene J. Corello
ATTORNEY AT LAW

CERTIFIED No: P 725 445

March 10, 1988

Judicial Council of the
State of California
350 McAllister Street
Room 3154
San Francisco, California 94102

Attention: William Davis, Executive Officer

Dear Sir:

On two separate occasions, on February 27, 1988 and again on March 4, 1988, I respectfully demanded that you and the Judicial Council execute your responsibilities mandated and owed to me as a citizen of the State of California under the provisions of the disqualification statutes of this State and Rules of Court which govern the disqualification of all Superior Court judges in the State of California and define your responsibilities as Executive Officer of the Judicial Council.

In my February 27, 1988 letter, I enclosed copies of my "Appellant's Motion for Disqualification of Jack Newman, Alfred Margolis, Frederick Woods, Robert Robertson, Judges of the Los Angeles Superior Court (Appellate Department)" filed February 5, 1988 and "Appellant's Formal Statutory Demand to Clerk of Los Angeles Superior Court (Appellate Department) Advising Judicial Council to Select Judge to Adjudicate Disqualification filed February 17, 1988."

In my March 4, 1988 letter I enclosed my Petition for Rehearing and Application for Transfer to Court of Appeal filed February 18, 1988 and the Declarations of Respondents Margolis, Newman, Robertson and Woods filed by them on February 12, 1988 in answer to my moved for disqualification of them filed February 5, 1988 as aforereferenced. Said verified answer by Respondents was pursuant to § 170.3(c)(3) of the Disqualification Statute. Clearly, Respondents sought to invoke and rely upon the statute because there is no question that as Los Angeles Superior Court judges they are subject to its language and provisions. Section 170.5 makes this fact profusely clear. "For purposes of Sections 170 to 170.5 inclusive, the following definitions apply: 'Judges' means "judges of the justice, municipal and superior courts and court commissioners and referees." The Respondents in their answer affirmatively admitted that "each is a judge of the Superior Court of the State of California for the County of Los Angeles." Furthermore, the legislature clearly

galvanized Los Angeles Superior Court judges sitting as the appellate department from § 170.6 challenges only [see § 170.7] and it is overwhelmingly clear from other provisions of the statute that the legislature distinguishes between § 170.3 (statutory cause) and § 170.6 (preemptory) disqualification challenges.

For instance, with respect to a challenge which can be made against a judge appointed by the Judicial Council to adjudicate the disqualification question, the legislature stated..."No challenge pursuant to Subdivision (c) of Section 170.3 or Section 170.6 may be made against the judge selected to decide the question of disqualification." [Section 170.3(c)(5)].

The rule of ejusdem generis applied to § 170.7 makes it conclusive that by exempting Los Angeles Superior Court judges sitting in the Appellate Department from § 170.6 challenges only, the legislature clearly intended them to be otherwise vulnerable to § 170.3 statutory cause challenges which is perceived as a discreet statutory challenge by them.

Indeed, the very language and statutory grounds expressed in § 170.1 (one thru seven) also commands a similar result: That statutory grounds for disqualification apply to and contemplate Los Angeles Superior Court judges such as Respondents named herein acting in the appellate department of said Los Angeles Superior Court.

I have received your letter of March 3, 1988 and regretably find it to be completely and wholly insufficient on a professional and legal basis in that you have consciously refused to exercise your responsibilities under law which you and the Judicial Council owe me. The Rules of Court, and Rule 63, make it clear that when Los Angeles Superior Court judges sitting in appellate department are disabled from acting or cannot act, on the requested transfer (filed February 18, 1988), the Judicial Council must act to select a judge to adjudicate the requested application for transfer to the Court of Appeal. Section 170.4 states:

> "A disqualified judge shall have no power to act in any proceeding after his or her disqualification or after the filing of a statement of disqualification until the question of his or her disqualification has been determined."

The motion for disqualification and supporting statement was filed on February 5, 1988 and remains unadjudicated because of the concerted action by your office, Respondent Clerk Hardy, and Respondent judges Margolis, Newman, Woods, and Robertson in obstructing presentation of my demand to the Judicial Council in accordance with law.

Since your letter of March 3, 1988 evidences an adamant unwillingness to appoint a judge to act on my statutorily-ordained demands, I am cogently legally persuaded that all orders of Respondents are null and void, and that Respondent Clerk and Respondent judges making and entering of orders known to be of no legal force or validity and false, are otherwise designed to criminally interfere with the exercise of my equal protection, due process rights of the laws of this state and of the United States. Accordingly, I must hold those personally involved criminally responsible and accountable for their conduct.

I again urge you to act to avoid further irreparable injury to me and personal liability to you and other members of the Judicial Council who, of course, enjoy no judicial immunity for their conscious abuse associated with this enterprise. Further, it is my position that the statutory bar to further action by Respondent judges occurred on February 5, 1988 (when motion for disqualification was filed), and is in force up and to the present time.

I remain,

Very truly yours,

Eugene J. Carella, Esq.
(A Colorado attorney)

P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

cc: Files (4); RCO

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CHIEF JUSTICE
MALCOLM M. LUCAS
CHAIRPERSON

JUDICIAL COUNCIL OF CALIFORNIA

ADMINISTRATIVE OFFICE OF THE COURTS
STATE BUILDING, ROOM 3154
350 McALLISTER STREET, SAN FRANCISCO 94102 • (415) 557-3203

LEGISLATIVE OFFICE
100 LIBRARY AND COURTS BUILDING, SACRAMENTO 95814 • (916) 445-7524

WILLIAM E. DAVIS
DIRECTOR

BURTON W. OLIVER
CHIEF DEPUTY DIRECTOR

March 3, 1988

Mr. Eugene J. Carella
Attorney at Law
P.O. Box 67292
Century City Station
Los Angeles, California 90067-0292

Re: Carella v. People of the State of California
Los Angeles Municipal Court No. M 83675
(Beverly Hills) -- Appeal No. CBA 24001

Dear Mr. Carella:

We have received your inquiry requesting that the Judicial Council stay the appellate proceeding described above and that a judge be assigned to resolve the question of the disqualification of all of the judges of the Los Angeles Superior Court Appellate Department to consider the appeal in your case.

We regret that we are unable to assist you and that we have no power to do as you request. Although this office is similarly not empowered to render legal opinions in pending litigation, we offer some information that may be helpful to you in understanding why we are unable to take the action you so urgently request.

First, under the statutory scheme for the disqualification of judges, it is the court, not counsel or the parties, that forwards a request for assignment of a judge to a) hear the disqualification issue (See Code of Civil Procedure section 170.3(c)(5)) or b) handle the proceeding if no judge in the court is qualified to act (See Code of Civil Procedure section 170.8.) Accordingly, it is our office policy to assist the Chief Justice in issuing assignments only in response to requests for assistance from the courts. This office does not act upon requests from individual litigants or their attorneys.

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Secondly, there is nothing in the statute that confers upon the Judicial Council the power to stay an action pending in any court. Indeed, the Judicial Council is not a court, and it would appear has no power to issue stays under any circumstances.

We have been informed by Mr. Alan Hardy, clerk of the appellate department of the Los Angeles Superior Court, that it is the court's position that there is no basis for requesting assignment of a judge in this case because the statutory scheme for motions to disqualify judges does not apply to appellate judges. (See for example Kaufman v. Court of Appeal (1982) 31 Cal.3d 933.) If in the future the clerk or a judge from the Los Angeles Superior Court does request assignment in this matter, we will be happy to take the necessary steps to assure that a judge is assigned in a timely manner.

We regret that we are unable to assist you further.

Very truly yours,

William E. Davis
Director

WED:ecr
0396C

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Eugene J. Carella
ATTORNEY AT LAW

CERTIFIED No: P 047 780 553

For Immediate Attention:

March 4, 1988

Judicial Council of the State of California
350 McAllister Street
Room 3154
San Francisco, California 94102

Attention: William Davis, Executive Officer

Dear Sir:

Enclosed please find a copy of my letter dated February 27, 1988 and received by your office the morning of March 2, 1988. In my letter I demanded immediate intervention and action by the Judicial Council in accordance with the Rules of Court and the laws of this State.

I am forwarding you additional documents pertinent to the responsibilities of the Judicial Council on this matter, and I am specifically requesting that action be commenced at the earliest possible time by the Council.

I am enclosing the Declarations of Respondents Margolis, Newman, Robertson, Woods filed February 12, 1988 in response to my Motion for Disqualification filed and served on them on February 5, 1988. The declaration in Paragraph One (1) states as follows:

"That each of the undersigned is a Judge of the Superior Court of the State of California for the County of Los Angeles." This admission is conclusive as to the applicability of the disqualification statute to them. (See, § 170.5 - Definitions).

Further, I am forwarding you copies of "Appellant's Petition for Rehearing and Application for Transfer" which I timely filed with the Clerk subsequent to the Motion for Disqualification on February 5, 1988. Since the Respondent Los Angles Superior Court judges are without power or authority to act on the transfer or rehearing, I am specifically requesting that pursuant to Rules of Court § 6243 that a panel be appointed by the Judicial Council to act on the subject document who is free from bias, hatred, discrimination that has been carried out against me. I am also enclosing the nullity order of the Los Angeles Superior Court judges entered February 24.

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1988, denying all the relief in the aforereferenced petition for rehearing and application for transfer as evidence of judicial fraud and criminal misuse of process which has been precipitated against me and continues to the present time.

Again, I affirm the necessity for swift action by the Judicial Council in accordance with law and request an evidentiary hearing on the Motion for Disqualification (filed February 5, 1988) and a hearing on the within enclosed Petition for Rehearing and Application for Transfer (filed February 16, 1988). [See Amo & 170.8]

I also specifically demand the enclosed documents be made a part of the evidentiary documents supporting the disqualification of the aforenamed Superior Court judges.

I look forward to your expedited response to the foregoing.

Thank you for your attention to this matter.

I remain,

Very truly yours,

EUGENE JOHN CARELLA, ESQ.

P. O. Box 67292
Century City
Los Angeles, CA 90067-0292

cc: Files (4)

ENCLOSURES

P. S. Also enclosed is my biographical summary of my background for the Judicial Council's edification.

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Eugene J. Carella
ATTORNEY AT LAW

February 27, 1988

Judicial Council of the State of California
350 McAllister Street
Room 3154
San Francisco, California 91402

Attention: William Davis, Executive Officer
For Immediate Action

Dear Sir:

Enclosed you will find two (2) conformed documents filed with the Clerk of the Los Angeles Superior Court styled as follows: "Appellant's Motion for Disqualification of Jack Newman, Alfred Margolis, Frederick Woods, Robert Robertson, Judges of Los Angeles Superior Court Appellate Department," filed February 5, 1988; and "Appellant's Formal Statutory Demand to Clerk of Appellate Department of Los Angeles Superior Court Advising Judicial Council to Select Judge to Adjudicate Disqualification," filed February 17, 1988, pursuant to Rule 170.3(c)(5)(6).

On Friday, February 26, 1988, when I sought verification from the Clerk of the Los Angeles Superior Court Appellate Department as to when the aforereferenced Motion for Disqualification was transmitted to the Judicial Council, I was brazenly informed by Alan Hardy, Chief Deputy Clerk of said Court, that he refused to do so despite his mandatory duties under the Rules of Court and would continue to do so, notwithstanding the Disqualified Judges filed an Answer to the Motion for Disqualification admitting various charges in the motion.

Further I advised Mr. Hardy that his actions were criminal in nature and that he was acting with conscious awareness and in furtherance of a criminal racketeering conspiracy orchestrated against me. After my conversation with Mr. Hardy, I forthwith contacted the Federal Bureau of Investigation to apprise them personally of the criminal conspiracy carried out against me in Case No. M 83675 and Appeal No. A 24001.

I contacted your office on Friday afternoon and was apprised that you were away from your office. I

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did, however, leave a formal message with your Assistant May of the need for swift action by your office.

This letter, together with the attached enclosed, represents formal demand by me that the Judicial Council act immediately on "A Time of the Essence Basis" to "Stay All Process In the Appeal and Trial Court" pending investigation by your office into these most serious criminal irregularities of process and until such time as a judge has been appointed by the Council to adjudicate the merits of my Disqualification Motion and has afforded me the evidentiary hearing requested by me to document the moved for disqualification. The entire legal process, and each of us, suffers irreparably when contemptuous disregard and abuse of the Rules of Court, laws of this State and provisions of federal constitution, such as those contained herein, are permitted to exist uncorrected.

I look forward to immediate confirmation that my motion has been placed on calendar for hearing and adjudication before a judge appointed by the Judicial Council impartial and able to determine the motion fairly and free from bias, prejudice and discrimination and in accordance with law, and that the Judicial Council has communicated an Order both to the Los Angeles Superior Court Appellate Department and Judith Stein, trial judge of the Los Angeles Municipal Court, Beverly Hills Judicial District, staying all orders and actions until further order of the Judicial Council.

I am most emphatic in advising you and the Council that I am the subject of a vicious, heinous criminal abuse of process by both the trial judge of the Los Angeles Municipal Court, Beverly Hills Judicial District, and the judges who are the subject of the disqualification motion enclosed, acting in concert to deprive me of my civil and constitutional rights, due process and equal protections under the law.

I eagerly await your response.

Very truly yours,

Eugene John Carella, Esq.
A Colorado Attorney

P. O. Box 67292
Century City Station
Los Angeles, CA 90067-0292

cc: Files (4)

8J.

"Sec. 416. Any section of any act enacted by the Legislature during the 1982 portion of the 1981–82 Regular Session, which takes effect on or before January 1, 1983, and which amends, amends and renumbers, adds, repeals and adds, or repeals a section amended, amended and renumbered, added, repealed and added, or repealed by this act, shall prevail over this act, whether such act is enacted prior to or subsequent to this act."

Cross References

Costs, taxation by judge at chambers, see § 1033.
Duties of judge in regard to inventory and appraisement of estates, see Probate Code § 600 et seq.
Judges, chambers, rules and hours, see Government Code § 24301.
Justice courts statutes time prohibitions, see § 1163.
Mandamus, not issuable to justice or municipal courts, see § 1085.
Motions to be made to court to which action pending, exceptions under this section, see § 1008.
Municipal court statutes time prohibitions, see § 1163.
Orders for production of will, see Probate Code § 321.
Probate of wills, see Probate Code § 320 et seq.
Prohibition, not issuable to justice or municipal courts, see § 1103.
Writ of review, not issuable to justice or municipal courts, see § 1068.

§ 167. Performance of acts of clerk

Any act required or permitted to be performed by the clerk of a court may be performed by a judge thereof, and shall be performed by a judge in any court having no clerk. *(Added by Stats.1969, c. 1610, § 1.)*

Former § 167 was repealed by Stats.1933, c. 743, § 61.

CHAPTER 3. DISQUALIFICATIONS OF JUDGES

Section
170 Duty to decide.
170a, 170b Repealed.
170.1 Grounds for disqualification.
170.2 Circumstances not constituting grounds for disqualification.
170.3 Proceedings, waiver, failure or refusal to withdraw.
170.4 Powers of disqualified judges.
170.5 Definitions.
170.6 Procedure against party, attorney or counsel thereof; motions and affidavits, assignment of another judge, court commissioner or referee; number of motions; exceptions; exclusive remedy; severability.
170.7 Judge serving on appellate department; application of section 170.6.
170.8 No qualified judge, assignment of judge.
171 to 173. Repealed.

§ 170. Duty to decide

A judge has a duty to decide any proceeding in which he or she is not disqualified. *(Added by Stats. 1984, c. 1555, § 2.)*

Former § 170 was repealed by Stats. 1984, c. 1555, § 1. See, generally, §§ 170.1, 170.3.

Cross References

Affinity, defined, see § 17.
Change of place of trial, see §§ 397, 398.
Degree of consanguinity relationship, see Probate Code § 251 et seq.
Disqualifications of judge in probate proceedings, see Probate Code § 303.
Judge as relative or associate of appraiser of estates, see Probate Code § 608.
Practice of law by judges, see Government Code §§ 68082, 68083.
Prejudice against party, attorney or counsel thereof, exclusive remedy, see § 170.6.
Relationship between judge and receiver, see § 566.

§ 170a. Repealed by Stats.1984, c. 1555, § 3

§ 170b. Repealed by Stats.1933, c. 743, § 61

§ 170.1. Grounds for disqualification

(a) A judge shall be disqualified if any one or more of the following is true:

(1) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding.

(2) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding upon any matter involved in the action or proceeding.

A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

(A) A party to the proceeding or an officer, director, or trustee of a party was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law; or

(B) A lawyer in the proceeding was associated in the private practice of law with the judge.

A judge who served as a lawyer for or officer of a public agency which is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.

(3) The judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding.

A judge shall be deemed to have a financial interest within the meaning of this paragraph if:

(A) A spouse or minor child living in the household has a financial interest; or

(B) The judge or the spouse of the judge is a fiduciary who has a financial interest.

A judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of children living in the household.

(4) The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party.

(5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of

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the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding.

(6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice toward a lawyer in the proceeding may be grounds for disqualification.

(7) By reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding.

(b) A judge before whom a proceeding was tried or heard shall be disqualified from participating in any appellate review of that proceeding.

(c) At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court. *(Added by Stats. 1984, c. 1333, § 3.)*

Former § 170.1 was repealed by Stats. 1984, c. 1333, § 4.

Cross References

Affinity, defined, see § 17.
Each generation a degree, see Probate Code § 251.

§ 170.2. Circumstances not constituting grounds for disqualification

It shall not be grounds for disqualification that the judge:

(a) Is or is not a member of a racial, ethnic, religious, sexual or similar group and the proceeding involves the rights of such a group.

(b) Has in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided in paragraph (2) of subdivision (a) of, or subdivision (b) or (c) of, Section 170.1.

(c) Has as a lawyer or public official participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue in the proceeding unless the judge believes that his or her prior involvement was so well known as to [illegible] a reasonable person in the public [illegible] his or her capacity to be impartial. *(Added by Stats. 1984, c. 1333, § 4.)*

§ 170.3. Proceedings; waiver; failure or refusal to withdraw

(a)(1) Whenever a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge of the court of his or her recusal and shall not further participate in the proceeding, except as provided in Section 170.4, unless his or her disqualification is waived by the parties as provided in subdivision (b).

(2) If the judge disqualifying himself or herself is the only judge or the presiding judge of the court, the notification shall be sent to the person having authority to assign another judge to replace the disqualified judge.

(b)(1) A judge who determines himself or herself to be disqualified after disclosing the basis for his or her disqualification on the record may ask the parties and their attorneys whether they wish to waive the disqualification. A waiver of disqualification shall recite the basis for the disqualification, and is effective only when signed by all parties and their attorneys and filed in the record.

(2) The judge shall not seek to induce a waiver and shall avoid any effort to discover which lawyers or parties favored or opposed a waiver of disqualification.

(3) In the event that grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification is waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge.

(c)(1) If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge. The statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. Copies of the statement shall be served on each party or his or her attorney who has appeared and shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers.

(2) Without conceding his or her disqualification, a judge whose impartiality has been challenged by the filing of a written statement may request any other judge agreed upon by the parties to sit and act in his or her place.

(3) Within 10 days after the filing or service, whichever is later, the judge may file a consent to disqualification in which case the judge shall notify the presiding judge or the person authorized to appoint a replacement of his or her recusal as provided in subdivision (a), or the judge may file a written verified answer admitting or denying any or all of the allegations contained in the party's statement, admitting or denying that [illegible] material or relevant to the question of disqualification. The clerk shall forthwith transmit a copy of the judge's answer to each party or his or her attorney who has appeared in the action.

(4) A judge who fails to file a consent or answer within the time allowed shall be deemed to have consented to his or her disqualification and the clerk shall notify the presiding judge or person authorized to appoint a replacement of the recusal as provided in subdivision (a).

(5) No judge who refuses to recuse himself or herself shall pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement

§3

of disqualification filed by a party. In every such case, the question of disqualification shall be tried and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice-chairperson. The clerk shall notify the executive officer of the Judicial Council of the need for a selection. The selection shall be made as expeditiously as possible. No challenge pursuant to subdivision (c) of Section 170.3 or Section 170.6 may be made against the judge selected to decide the question of disqualification.

(b) The judge deciding the question of disqualification may decide the question on the basis of the statement of disqualification and answer and such written arguments as the judge requests, or the judge may set the matter for hearing as promptly as practicable. If a hearing is ordered, the judge shall permit the parties and the judge alleged to be disqualified to argue the question of disqualification and shall for good cause shown hear evidence on any disputed issue of fact. If the judge deciding the question of disqualification determines that the judge is disqualified, the judge hearing the question shall notify the presiding judge or the person having authority to appoint a replacement of the disqualified judge as provided in subdivision (a) of Section 170.3.

(d) The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision and only by the parties to the proceeding. *(Added by Stats. 1984, c. 1555, § 7.)*

§ 170.4. Powers of disqualified judges

(a) A disqualified judge, notwithstanding his or her disqualification may do any of the following:

(1) Take any action or issue any order necessary to maintain the jurisdiction of the court pending the assignment of a judge not disqualified.

(2) Request any other judge agreed upon by the parties to sit and act in his or her place.

(3) Hear and determine purely default matters.

(4) Issue an order for possession prior to judgment in eminent domain proceedings.

(5) Set proceedings for trial or hearing.

(6) Conduct settlement conferences.

(b) Notwithstanding paragraph (5) of subdivision (a) of Section 170.3, if a statement of disqualification is untimely filed or if on its face is discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken.

(c)(1) If a statement of disqualification is filed after a trial or hearing has commenced by the start of voir dire, by the swearing of the first witness or by the submission of a motion for decision, the judge whose impartiality has been questioned may order the trial or hearing to continue, notwithstanding the filing of the statement of disqualification. The issue of disqualification shall be referred to another judge for decision as provided in subdivision (a) of Section 170.3, and if it is determined that the judge is disqualified, all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated.

(2) For the purposes of this subdivision, if (A) a proceeding is filed in a single judge court or has been assigned to a single judge for comprehensive disposition, and (B) the proceeding has been set for trial or hearing 30 or more days in advance before a judge whose name was known at the time, the trial or hearing shall be deemed to have commenced 10 days prior to the date scheduled for trial or hearing as to any grounds for disqualification known before that time.

(3) A party may file no more than one statement of disqualification against a judge unless facts suggesting new grounds for disqualification are first learned of or arise after the first statement of disqualification was filed. Repetitive statements of disqualification not alleging facts suggesting new grounds for disqualification shall be stricken by the judge against whom they are filed.

(d) Except as provided in this section, a disqualified judge shall have no power to act in any proceeding after his or her disqualification or after the filing of a statement of disqualification until the question of his or her disqualification has been determined. *(Added by Stats. 1984, c. 1555, § 8.)*

§ 170.5. Definitions

For the purposes of Sections 170 to 170.5, inclusive, the following definitions apply:

(a) "Judge" means judges of the justice, municipal, and superior courts, and court commissioners and referees.

(b) "Financial interest" means ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value in excess of one thousand five hundred dollars ($1,500), or a relationship as director, advisor or other active participant in the affairs of a party, except as follows:

(1) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in those securities unless the judge participates in the management of the fund.

(2) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization.

(3) The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest.

(c) "Officer of a public agency" does not include a Member of the Legislature or a state or local government official acting in a legislative capacity.

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d) The third degree of relationship shall be calculated ...ding to the civil law system.

...) "Private practice of law" includes a fee for service, ...ner, or salaried representation of private clients or ...ic agencies, but excludes lawyers as full-time employ... of public agencies or lawyers working exclusively for ... ted offices, public defender offices, or similar profit entities whose clientele is by law restricted to ...ndigents.

...) "Proceeding" means the action, case, cause, mo... or special proceeding to be tried or heard by the ...r.

...) "Fiduciary" includes any executor, trustee, guardi... or administrator. *(Added by Stats. 1984, c. 1555, ...)*

...tion § 170.5 was repealed by Stats. 1999, c. 1099, § 1.

170.6. Prejudice against party, attorney or interest ...therof; motion and affidavit; assignment of anoth... or judge, court commissioner or referee; number of motions; continuance; cumulative remedy; severability

...) No judge, court commissioner, or referee of any ...rior, municipal or justice court of the State of ...fornia shall try any civil or criminal action or special ...ceeding of any kind or character nor hear any matter ...rein which involves a contested issue of law or fact ...n it shall be established as hereinafter provided that ... judge or court commissioner is prejudiced against ... party or attorney or the interest of any party or ...ney appearing in such action or proceeding.

...) Any party to or any attorney appearing in any ... action or proceeding may establish such prejudice ... oral or written motion without notice supported by ...avit or declaration under penalty of perjury or an ...statement under oath that the judge, court commis... or referee before whom such action or proceeding ...nding or to whom it is assigned is prejudiced against ...such party or attorney or the interest of such party or ...ney so that such party or attorney cannot or believes ...he cannot have a fair and impartial trial or hearing ...e such judge, court commissioner, or referee. ...e the judge, court commissioner, or referee assigned ... who is scheduled to try the cause or hear the matter ...own at least 10 days before the date set for trial or ...ng, the motion shall be made at least five days ...re that date. If directed to the trial of a cause where ... is a master calendar, the motion shall be made to ...dge supervising the master calendar not later than ...me the cause is assigned for trial. If the court in ... the action is pending is authorized to have no ... than one judge and the motion claims that the duly ...ed or appointed judge of that court is prejudiced, the ...on shall be made before the expiration of 30 days ... the date of the first appearance in the action of the ... who is making the motion or whose attorney is ...ng the motion. In no event shall any judge, court ...missioner, or referee entertain such motion if it be ... after the drawing of the name of the first juror, or if there be no jury, after the making of an opening statement by counsel for plaintiff, or if there be no such statement, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing (other than the trial of a cause), the motion must be made not later than the commencement of the hearing. In the case of trials or hearings set herein specifically provided for, the procedure herein specified shall be followed as nearly as may be. The fact that a judge, court commissioner, or referee has presided at or acted in connection with a pretrial conference or other hearing, proceeding or motion prior to trial and not involving a determination of contested fact issues relating to the merits shall not preclude the later making of the motion provided for herein at the time and in the manner hereinbefore provided.

A motion under this paragraph may be made following reversal on appeal of a trial court's decision if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. The motion shall be made within 60 days after the party or the party's attorney has been notified of the assignment.

(3) If such motion is duly presented and such affidavit or declaration under penalty of perjury is duly filed or such oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge, court commissioner, or referee to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending or, if there is no other judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chairman of the Judicial Council shall assign some other judge, court commissioner, or referee to try such cause or hear such matter as promptly as possible. Under no circumstances shall a party or attorney be permitted to make more than one such motion in any one action or special proceeding pursuant to this section; and in actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

(4) Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing shall not be granted by reason of the making of a motion under this section. If a continuance is granted, the cause or matter shall be continued from day to day or for other limited periods upon the trial or other calendar and shall be reassigned or transferred for trial or hearing as promptly as possible.

(5) Any affidavit filed pursuant to this section shall be in substantially the following form:

(Here set forth court and cause)

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State of California, County of } ss. PEREMPTORY CHALLENGE

_____ being duly sworn, deposes and says: That he is a party (or attorney for a party) to the within action (or special proceeding). That _____ the judge, court commissioner, or referee before whom the trial of the (or a hearing in the) aforesaid action (or special proceeding) is pending (or to whom it is assigned), is prejudiced against the party (or his attorney) or the interest of the party (or his attorney) so that affiant cannot or believes that he cannot have a fair and impartial trial or hearing before such judge, court commissioner, or referee.

_____

Subscribed and sworn to before me this _____ day of _____ 19_____.

(Clerk or notary public or other officer administering oath)

(6) Any oral statement under oath or declaration under penalty of perjury made pursuant to this section shall include substantially the same contents as the affidavit above.

(7) Nothing in this section shall affect or limit the provisions of Section 170 and Title 4, Part 2, of this code and this section shall be construed as cumulative thereto.

(8) If any provision of this section or the application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application and to this end the provisions of this section are declared to be severable. *(Added by Stats.1957, c. 1033, § 1. Amended by Stats.1959, c. 640, § 1; Stats.1961, c. 526, § 1; Stats.1965, c. 1442, § 1; Stats.1967, c. 1602, § 2; Stats.1970, c. 1071, § 1; Stats. 1981, c. 192, § 1; Stats.1982, c. 1644, § 2; Stats.1985, c. 715, § 1.)*

Cross References

Compulsory attendance, reference hearings, motion, see Welfare and Institutions Code §§ 650, 661, 700.2.
Disqualification of arbitrator, application of this section, see § 1141.10.
"Oath", defined, see Penal Code § 119.
Subornation under oath, perjury, see Penal Code §§ 118, 121, 125.

§ 170.7. Judge serving on appellate department; application of section 170.6

Section 170.6 does not apply to a judge designated or assigned to serve on the appellate department of a superior court in his capacity as a judge of such department. *(Added by Stats.1963, c. 872, § 1.)*

§ 170.8. No qualified judge; assignment of judge

When there is no judge of a court qualified to hear an action or proceeding, the clerk or, if there be no clerk, the judge shall forthwith notify the Chairman of the Judicial Council of that fact. The judge assigned by the Chairman of the Judicial Council shall hear the action or proceeding at the time fixed therefor or, if no time has been fixed or good cause appears for changing the time theretofore fixed, the judge shall fix a time for hearing in accordance with law and rules and hear the action or proceeding at the time so fixed. *(Added by Stats.1963, c. 872, § 2.)*

§§ 171 to 173. Repealed by Code Am.1880, c. 35, § 1; Stats.1963, c. 206, § 7

See, now, Gov.C. §§ 68082, 68083.

CHAPTER 4. INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS

Section
176. Repealed.
177. Conduct of proceedings.
177.5. Money sanctions.
178. Punishment for contempt.
179. Taking and certifying acknowledgments, affidavits or depositions.

§ 176. Repealed by Stats.1933, c. 743, § 61

See, now, § 166.

§ 177. Conduct of proceedings

Every judicial officer shall have power:

1. To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;

2. To compel obedience to his lawful orders as provided in this Code;

3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this Code;

4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties. *(Enacted 1872. Amended by Code Am.1880, c. 35, § 1.)*

Cross References

Abuse of process a contempt, see § 1209.
Acts or omissions contemplation of court's authority, see § 1209.
Affirmation, see §§ 2093, 2097.
Contempt for disobedience of subpoena, see §§ 1209, 1991.
Contempt in court's presence, see § 1211.
Judicial officer, defined, see Elections Code § 20.
Oath, see § 2093 et seq.
Refusal of witness to be sworn, see § 1991.
Security required for breach of peace in court's presence, see Penal Code § 710.
Similar provisions, see § 128.
Subpoenas, in general, see § 1986.
Witnesses,
Attendance from outside county, see § 1989.
Compelling attendance in election contests, see Elections Code § 20082.

§ 177.5. Money sanctions

A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, payable to the

213-491-6126
213-491-6131
213-491-6132
213-491-6136
213-491-6138
213-491-6141
213-491-6143
213-491-6146
213-491-6151
213-491-6153
213-491-6156
213-603-7812
213-603-7741
213-603-7738
213-603-7211
213-603-7731
213-620-7751
213-633-7754
213-603-7711
213-603-7714
213-603-7717
213-603-7721
213-603-7724
213-603-7727
213-603-7201
213-968-9711
213-533-6608
213-533-6621
213-533-6628
213-533-6632
213-533-6636
213-533-6666
213-533-6641
213-533-6646
213-533-6656
213-533-6661
213-533-6668
213-533-6672
213-458-5286
213-458-5301
213-458-5304
213-458-5307
213-458-5311
213-458-5313
213-458-5315
213-458-5404
213-458-5408
213-458-5317
213-458-5281
213-458-5272
213-458-5265
213-458-5260
226-2917
226-2924
226-2929

Hours: Monday through Thursday, Law & Motion, 9:00 A.M., Dept. R
Writs, Receivers and Ex Parte, Daily, 10:00 A.M. to 11:00 A.M., Dept. R

Location of Special Departments — Central District

(Except where noted, telephone 974-5411)

	Building	Dept.	Room	Phone
Presiding Judge	Courthouse		204	974-5564
Assignments & Miscellaneous Matters	Courthouse	43	419	974-5661
Appeals	Courthouse	70	607	974-5781
Attorney Admissions	Courthouse		216	974-5425
Civil Defaults Prove-Up	Courthouse	1A	2068	974-5796
Civil Courts Coordinator	Courthouse		209	974-5408
Civil Master Calendar Office	Courthouse	1	234	974-5466
Civil Master Calendar Courtroom Office	Courthouse	1	222	974-5561
Commissioners' Office, Ex Parte	Courthouse	1A	206	974-5475
Court Reporter and Assignments	Courthouse		216	974-5451
Criminal Master Calendar	Criminal Courts Bldg.	100	13-307	974-5711
Criminal Courts Coordinator	Criminal Courts Bldg.		13-309	974-5811
Eminent Domain	Courthouse	90	518	974-5883
Family Law Dept.				
Dissolutions, Nullity Proceedings, Contested Trials, OSC	Courthouse	2	215	974-5566
Conciliation Court	Courthouse		241	974-5524
Interpreter Assignments	Criminal Courts Bldg.		13-514	974-5446

	Building	Dept.	Room	Phone
Juvenile Courts Delinquency Coordinator	Criminal Courts Bldg.		12-A	974-5961
Juvenile Courts Dependency Coordinator	Criminal Courts Bldg.		12-A	974-5961

Law Department	Information			974-5158
				Telephonic
Supervising Judge	Clerk	Tentative Rulings	Room	Arguments
Department 86	974-5175		535	620-9463
Department 80	974-5787		539	
1-25 Department 81 –	974-5798	974-5918	631	617-1796
26-50 Department 82	974-5888	974-5916	633	617-1797
51-75 Department 83	974-5886	974-5913	630	617-2927
76-00 Department 84	974-5887	974-5912	632	617-9327
Management Systems Division	Courthouse		606K	974-5123
Mental Health Depts.	1150 San Fernando Rd.	95-95A		226-2906
Probate Master Calendar	Courthouse	11	248	974-5601
Probate	Courthouse	8	239	974-5994
Probate Commissioners	Courthouse		258	974-5471
Supplementary Proceedings	Courthouse	1A	209	974-5440
Trial Setting & Arbitration Status Conference	Courthouse	3	224	974-5589
Writs and Receivers — Odd Numbers	Courthouse	85	633	974-5886
Writs and Receivers — Even Numbers	Courthouse	86	636	974-5961

JUVENILE DEPARTMENT

Gabriel Gutierrez, Presiding Judge — Kathryn Doi Todd, Supv. Judge — John Crowner, Director

Centra Juvenile Court
210 W. Temple St. (90012) 974-5661

Antelope Valley Facility	1040 W. Ave. J, Lancaster (93534)	805/940-6486
Centra Facility	210 W. Temple (90012)	974-4818 & 974-5963
Compton Facility	200 W. Compton Blvd., Compton (90220)	603-7301
Eastlake Facility	1601 Eastlake Ave. (90033)	226-8681
Inglewood Facility	110 Regent, Inglewood (90301)	419-5281
David V. Kenyon Juv. Justice Center	7625 S. Central Ave. (90001)	586-8066
Long Beach Facility	415 W. Ocean Blvd., Long Beach (90802)	491-6157
Los Padrinos Facility	7281 E. Quill, Downey (90242)	922-8813
Pasadena Facility	300 E. Walnut, Pasadena (91101)	818/356-5671
Pomona Facility	400 Civic Center Plaza, Pomona (91766)	818/967-1411
San Fernando Valley Facility	16360 Filbert St., Sylmar (91342)	818/362-4331

LOS ANGELES SUPERIOR COURT JUDGES

Thomas T. Johnson, Presiding Judge

Abler, Richard A.
Aeschlan, David J.
Albrecht, James A.
Allen, Warren D.
Alsten, Gilbert C.
Altman, Robert T.

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LOS ANGELES COUNTY (Continued)

Armstrong, Robert W.
Ashmann, Judith Meseke
Bach, Burton
Baffa, Frank
Baldonado, Arthur
Barrera, Victor T.
Bazan, Alfonso M.
Beam, Ellsworth M.
Berg, Michael
Bermasen, Florence
Beverly, William C.
Bigelow, M. Ross
Biggerstaff, Ralph A.
Boland, Paul
Boren, Roger W.
Breckenridge, Paul G., Jr.
Brown, Nancy M.
Burke, Michael L.
Byrne, Richard P.
Cassie, Ronald E.
Cardenas, Reymond
Chervet, Richard F.
Chernow, Eli
Chirin, Judith C.
Choate, Raymond
Carichael, Sam
Clay, William R.
Cole, John J.
Compton, Barnet M.
Corral, Jaime R.
Crockard, Jack A.
Croft, Janice Claire
Crosley, H. Walter
Deering, Warren H.
Denner, Richard
Deutz, Max F.
Dixon, Sally G.
Dorn, Roosevelt F.
Dowda, Norman R.
Dunbar, Rosemary M.
Dunnum, Carroll M.
Early, Alexander R., III
Einstein, Robert
Epstein, Norman L.
Fagan, D. Sterry
Feiner, Robert
Fieldhouse, Carol
Fields, Jerome K.
Fletcher, Daniel L.
Flier, Madeleine I.
Freiser, Vernon G.
Francesius, Mortimer
Fretianna, Robert D.
Frisco, Charles E.
Fuesser, Hiroshi
Fukaki, Mario L.
Gale, Kenneth W.
Gasmasri, Bruce R.
George, Ronald M.
Godoy Perez, Ramona
Goerdan, Jack E.
Goelin, Martha
Gordon, Norman W.
Gorman, Edward L.
Grover, Melvin B.
Guisemez, Gabriel A.
Haber, Alan B.
Harris, Richard G.
Hastings, J. Gary
Henning, John L.
Henry, Dana B.
Higa, Robert J.
Hight, Bob T.
Hinz, Edward A., Jr.
Hiroshige, Ernest M.
Hogan, Maurice R., Jr.
Hollingsworth, W. R., Jr.
Horowitz, David A.
Hubbell, Richard C.
Ibanez, Richard A.
Jenevs, Dzintra
Johnson, Barbara Jean
Johnson, Thomas T.
Jones, Charles E.
Jones, Philip F.
Kakita, Edward Y.
Kasin, Joseph R.
Kaluzson, Richard
Katz, Burton S.
Kaufman, Dan
Kelly, Ernest L.
Klausner, Gary
Kolosseo, Richard G.
Kolts, James G.
Lachs, Stephen M.
LaFront, Robert L.
LaVine, Richard A.
Leetham, Julius A.
Leitsau, Robert M.
Levie, Gerald J.
Lew, Ronald S. W.
Lewin, Kurt J.
Light, Leslie W.
Long, Eugene J.
Lopez, Robert B.
Major, John H.
Malarik, Robert M.
Malone, Stanley R., Jr.
Mandel, Alfred I.
Markby, Christen L., Jr.
Martin, Bonnie Lee
Martinez, Robert M.
Matthews, Albert D.
Matsumba, Jean
McGinley, William E.
McKee, Douglas A.
McVittie, William J.
Miller, Loren, Jr.
Mills, Billy G.
Mills, Cecil J.
Monaco, Richard
Moore, H. Randolph, Jr.
Morrow, Dion G.
Munat, Aurelio
Nadell, James P.
Nelson, Irwin J.
Nelson, Peggy S.
Newmark, Jack M.
Northcutt, Roy C.
Nuss, Thomas P.
Nye, Robert C.
O'Brien, Robert H.
Older, Charles H.
Olsen, Robert M.
O'Rourke, Terry Bryan
Ortega, Reuben A.
Parish, Robert U.
Pekarsnish, George R., Jr.
Perez, David G.
Pfau, Glenn M.
Platt, James H.
Platt, Theodore
Prichard, Florence T.
Pruan, Michael
Pete, Donald F.
Pierce, Sheila F.
Pounders, William R.
Redin, Sara K.
Reed, Rebecca
Reese, James H.
Reid, Marie
Riley, Earl F.
Rimerman, Fred
Ringer, Gordon
Rubenstein, Lawrence J.
Roberson, Robert L., Jr.
Rosenman, Marion
Ross, Edward M.
Rothman, David M.
Rothchild, Frances
Rowen, Marvin D.
Rudell, Joel
Rylaum, Jack T.
Saetta, Philip M.
Sevitch, Leon
Scarisi, Charles R.
Schaefer, David
Schempp, Darlene E.
Schifferman, Robert P.
Schneider, Thomas
Schwab, Howard J.
Schwartz, S. S.
Shabo, Harold E.
Sheldon, Betty Jo
Sheldon, Charles O.
Shimer, Irving A.
Shook, John P.
Smith, Peter S.
Sosebe, Bruce J.
Sowin, Abby
Stanton, John R.
Stevens, Lillian M.
Stromwall, Clarence A.
Sutton, James M., Jr.
Swart, Coleman A.
Swearinger, Ronald E.
Swink, Jack W.
Tanner, Jack
Thelina, Howard J.
Thomas, David A.
Thomas, Robert W.
Todd, Kathryn D.
Torres, Richards A.
Tso, Jack S.
Tucker, Marcus O.
Turner, Paul
Tynan, Michael
Valenta, Carlos E.
Vogel, Miriam
Waddington, Laurence
Walker, J. Kimball
Wallis, Madge S.
Wayne, Diense L.
Weil, Robert I.
Weisberg, Jacqueline L.
Williams, Alexander H., III
Williams, Ernest G.
Winston, William H., Jr.
Wolf, Leonard S.
Woods, Fred
Wornmer, David A.
Xanthos, George
Younger, Eric

Court Reporters

Abbott, Joan R.
Arst, Robert S.
Baron, Elizabeth A.
Black, Kenneth A.
Blaylock, Robert J.
Briggs, James A.
Bridwell, Kent M.
Bubnick, Sam
Callan, Luther

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Carol, Alvin B.
Carol, Marty D.
Cassar, Florence-Marie
Cornell, Michael A.
Curtis, Richard A.
Dickey, John W.
Fletcher, Robert H.
Garfinkle, Irwin H.
Gold, Jack J.
Gordenstein, Abraham
Hausdorfer, H. Ronald
Hermann, Russell R.
Horman, Christine B.
Jones, Jewell
Juster, Sherman
Kamalo, George
Kightlinger, Harry J.
Klein, Herbert M.
Levin, Arnold
Maclaskey, Hugh E., Jr.
Moore, Jerry T.
Moroney, Carl V.
Moss, Milton L.
Mouron, Bertrand D., Jr.
Nosal, David R.
Olsen, Joe D.
Rice, Donald W.
Romney, Gary A.
Price, Michael G.
Rogins, Lee B.
Reichman, Victor I.
Rich, Leo S.
Robbins, Jill S.
Sanidas, John H.
Schaffer, Benson
Schneider, Robert A.
Shapiro, Anita Rae
Stockton, Ann
Stoudt, Bradley A.
Taylor, H. George
Tomlinson, John A.
Veleta, Mark
Orvell, James A., Jr.
Zaslow, Robert W.
Zellerbach, John
Zeavout, David A.

Officers

County Clerk/Executive Officer/Jury Commissioner
Frank S. Zolin 974-5401

Assistant County Clerk
Raul A. Acosta 974-5104

Director, District Courts
James DePriest 974-5119

Director, Central Civil/Family Law/Probate Services
David J. Collins 974-5118

Civil Court Coordinator
Arnold Pena 974-5408

Administrative Administrator
John B. Austin 974-5426

Division Chief, Court Services Division
Larry Jackson 974-5201

Division Chief, Civil Processing Division
George Cossard 974-5231

Director, Central Criminal Services
John Walker 974-5271

Criminal Courts Coordinator
John Iverson 974-5811

Probate Commissioner
Anne E. Stadtden 974-5481

Assistant Executive Officer
Eric D. Webber 974-5101

Director, Administrative Services
Edward C. Bunning 974-5108

Division Chief, Financial Management Division
John W. Slaster 974-5179

Division Chief, Management Systems Division
Larry Blankenship 974-5123

Chief, Facilities Management
Beverly Corcoran 974-5305

Director, Personnel Management
Ginger Vaduno 974-5134

Director, Payroll Services
David M. Davies 974-5830

Director, Family Court Services/Conciliation Court
Hugh Macaulay 974-5831

Director, Court Staff Services
Bunsella Harris 974-5363

Director, Juror Services
Raymond F. Arce 974-5814

Director, Juvenile/Mental Health Court Services
John Creamer 974-5121

Division Chief
Jim Shepard 209-8831

Delinquency Coordinator
Phyllis Johnson 974-5861

Dependency Coordinator
Charlene Saunders 974-5861

Los Angeles Probate Attorneys Office

111 N. Hill St., Rm. 258, Los Angeles (90012) 974-5481

Ann E. Stadtden, Probate Commissioner and Supervising Probate Attorney
Timothy Whitehouse, Asst. Supervising Probate Attorney

Supervising Probate Court Investigator — Jerry Wisner — 974-5859

Acer, Richard T.
Bain, Richard
Carroll, Marleen M.
Dickson, Archie
Fun, Lawrence
McLlary, John B.
Merrill II, John B.
Mooney, C. Duane
Neil, Theodore R.
Peck, John D.
Peterson, Warren K.
Stage, Edna
Thurman, Elaine

Office of the County Clerk and Clerk of the Superior Court

111 N. Hill St., Rm. 106E, Los Angeles (90012)
Information Only 974-5115

Accounting, Chief — 974-5147
Filing Window — 974-5186
Assignments — 974-5236
Civil Processing, Chief — 974-5231
Court Services, Chief — 974-5301
Criminal, Chief — 974-5271
Juvenile, Chief — 209-8831
Civil Master Calendar — 974-5484
Criminal Calendar — 974-5711
Mental Health — 209-2822
OSC Setting Clerk — 974-5173
Marriage Licenses/Corporation Supervisor — 974-5210

Marshal's Office

Robert F. Mann, Marshal
210 W. Temple St., Rm. L-4, Los Angeles (90012)
Administration: 974-5394

Civil Case Information: 974-5311
Criminal Warrant Information: 974-5336

(The Marshal of the Municipal Court of Los Angeles is also the Marshal of all the Municipal Courts in Los Angeles County.)

89

EUGENE JOHN CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, California 90067-0292

Appellant

ORIGINAL FILED
FEB 0 5 1988
COUNTY CLERK

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

EUGENE JOHN CARELLA, Appellant, vs. PEOPLE OF THE STATE OF CALIFORNIA, Respondent.	) Appeal No. CRA 24001)) LAMC M 83675 (Beverly Hi)) APPELLANT'S MOTION FOR D) FICATION OF JACK NEWMAN,) MARGOLIS, FREDERICK WOOD) ROBERT ROBERTSON, JUDGES) LOS ANGELES SUPERIOR COU) APPELLATE DEPARTMENT; ME) DUM OF POINTS AND AUTHOR DECLARATION OF EUGENE JO CARELLA, ESQ.

COMES NOW EUGENE JOHN CARELLA, ESQ., Appellant her
pursuant to the Rules of Court, and does hereby and herewi
move for the immediate disqualification and recusal of Jac
Newman, Alfred Margolis, Frederick Woods, Robert Robertson
Judges of the Los Angeles Superior Court Appellate Departm
and that each of them be and stand recused, prohibited and
proscribed from taking any further action on the aforestat
appeal, and that a successor panel be appointed to hear,
adjudicate, and otherwise preside over the conduct of the
appeal and proceedings and matters related thereto in the
above-styled appeal by the Chairperson of the Judicial Cou

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in accordance with law.

Said motion is made for cause pursuant to § 170.3(c) of the Rules of Court and to protect Appellant's right to receive a fair trial and appellate determination of his cause.

In support of said motion for disqualification of the aforestated judges, Appellant respectfully shows his Declaration identified as EXHIBIT "A" attached. Said motion is further based on all papers, pleadings, documents, records and the like on file herein -- together with the memorandum of points and authorities; and such further and additional evidence as may be adduced at the hearing hereon.

DATED: February 4, 1988

BY: _____
EUGENE JOHN CARELLA, ES

,,,

,,

91

DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE JOHN CARELLA, ESQ., declare and state as follows:

1. That I am the appellant in Appeal No. CRA 24001

2. That I make the instant written declaration pursuant to § 170.3(c)(1) objecting in no uncertain way for cause to having the hearing or trial or any aspect of the subject proceeding being adjudicated by Frederick Woods Alfred Margolis, Jack Newman, Robert Robertson, Judges of the Los Angeles Superior Court Appellate Department, and specifically and unequivocally demand they forthwith cease and desist in the subject proceeding and stand recused.

3. That I am informed and thereon state the aforer judges are disqualified on the following grounds:

The judges, and each of them, have personal knowle of disputed evidentiary facts pertaining to the proceeding and have gained said knowledge of the subject underlying proceedings and facts through ex parte sources not parties to the appeal and agreed in furtherance of a criminal con to violate appellant's civil and constitutional rights and to falsely imprison Appellant, a distinguished federal practitioner, notwithstanding the evidence or the merits of his appeal and to rule against him on every issue here:

4. That the judges have been instructed by third parties, including the National Security Council, Central

EXHIBIT "A" 92

Intelligence Agency, U. S. Department of Justice and others to rule against Appellant in the within appeal and to otherw deny him a fair hearing and appeal, and to falsely imprison appellant and to deny him preparation of a reporters transcri of trial proceedings.

5. That each judge's recusal is required in the interest of justice, and because a person aware of all the facts would entertain a "substantial doubt" that the judges would be able to impartially discharge his duties to Appellant and to adjudicate the merits of his appeals fairly.

6. That each of the named judges has gained knowle of the proceedings from extra-judicial sources and persons, impairing the discharge of their duties fairly and even-handedly to appellant.

7. That the judges, and each of them, is grossly biased and prejudiced against me, and has acted, and contin to act, in furtherance of a criminal racketeering conspirac interstate in nature, to falsely imprison me and to deprive me of my constitutional rights and liberties of life, liber and property, and I learned on February 4, 1988 that said judges have ruled to deprive and deny me the preparation and filing of the reporters transcripts of trial evidence, making it impossible for me to vindicate th twenty-three (23) grounds on appeal and despite my sta as being indi

and financially unable to pay for said transcripts.

8. That I learned today from the Clerk of the Superior Court Appellate Department the true names and identities of said appellate judges and that said judges have ruled to deny me the reporters transcripts at public expense even though I am indigent and even though the State Supreme Court in In Re Armstrong, 126 C.A. 3d 565 makes it mandatory that I be furnished said reporters transcripts at public expense.

9. That I am informed and believe and thereupon state that said judges have been offered consideration to rule against me in the subject appeal and to deny my motion for transcripts by third persons not associated with said proceedings.

10. That I specifically request the Judicial Council's intervention to appoint a judge to adjudicate this disqualification petition and grant me a hearing on said disqualifications.

11. That the foregoing statements and written declaration are made and filed in good faith to protect appellant's constitutional rights herein and to prevent against further criminal misconduct against Appellant.

I declare the foregoing is true and correct to

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the best of my knowledge and ability.

Executed on this 4th day of February 1988 in Los Angeles, California, under penalty of perjury.

EUGENE JOHN CARELLA, ESQ.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

"DISQUALIFICATION OF JUDGES" PROVISIONS OF THE RULES OF COURT CORRELATE RESPONDENT JUDGES OF THE SUPERIOR COURT, APPELLATE DEPARTMENT, AND ARE CLEARLY APPLICABLE IN ADJUDICATING THE MOTION FOR DISQUALIFICATION OF JUDGES MARGOLIS, WOODS, NEWMAN AND ROBERTSON.

Section 170.5

II.

RESPONDENT APPELLATE JUDGES ARE ONLY EXEMPTED FROM SECTION 170.6 DISQUALIFICATION CHALLENGES AND NOT SECTION 170.3, ET SEQ. CHALLENGES AS MADE BY APPELLANT HEREIN.

Section 170.7
Section 170.3(a)

III.

JUDICIAL COUNCIL MUST BE APPOINTED (SIC.) APPROVED BY THE CLERK OF THE SUPERIOR COURT FORTHWITH TO ADJUDICATE THE SOUGHT FOR DISQUALIFICATION OF RESPONDENT JUDGES BY APPELLANT.

Section 170.3(c)(4)(5)

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IV.

THAT APPELLANT'S MOTION FOR DISQUALIFICATION AND ACCOMPANYING AFFIDAVIT CONSTITUTE A PRIMA FACIE SHOWING OF DISQUALIFICATION PER SE AGAINST SAID RESPONDENT JUDGES OF THE LOS ANGELES SUPERIOR COURT APPELLATE DEPARTMENT REQUIRING THEIR IMMEDIATE RECUSAL AND VACATING OF ANY AND ALL JUDGMENTS, ORDERS RENDERED BY SAID APPELLATE RESPONDENT.

Section 170.3(c)

CONCLUSION

FOR ALL THE FOREGOING REASONS, Appellant respectfully prays that an Order forthwith issue declaring that Respondent Judges of the Los Angeles Superior Court, Jack Newman, Alfred Margolis, Frederick Woods, Robert Robertson be and stand recused, and that the Judicial Council be summoned immediately to adjudicate said disqualification motion and to act promptly to disqualify said judges and to appoint a new appellate panel consisting of four members who are free from bias, prejudice, animous, discrimination against Appellant and who are not acting on an ex parte basis to falsely imprison Appellant and deny him his basic constitutional rights, and that any and all orders, rulings, etc. made by said Respondent Judges Margolis, Newman, Woods, Robertson be forthwith vacated in accordance with law.

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DATED: February 4, 1988

BY: _____
EUGENE J. CARELLA, ESQ.

97

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this the____day of February I served a true copy of the foregoin Appellant's Motion for Disqualification of Alfred Margolis, Jack Newman, Frederick Woods, Robertson, Judges of Los Angeles Superior Court Appellate Department; Memorandum of Points and Authorities; Declaration of Eugene John Carella, Esq. on all parties of record by first class maill, postage prepaid, addressed as follows:

IRA REINER
District Attorney
849 S. Broadway
11th Floor
Los Angeles, CA 90014

Eugene J. Carella

9f

EUGENE J. CARELLA, ESQ.
P. O. Box 67292
Century City
Los Angeles, California 90067

Appellant

ORIGINAL FILED
FEB 17 1988
COUNTY CLERK

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

EUGENE J. CARELLA, ESQ., Appellant, v. PEOPLE OF STATE OF CALIFORNIA, Respondent.	Appeal No. CRA 24001 LAMC M 83675 APPELLANT'S FORMAL STATORY DEMAND TO CLERK OF APPELLATE DEPARTMENT OF LOS ANGELES SUPERIOR CC ADVISING JUDICIAL COUNC TO SELECT JUDGE TO ADJUCATE DISQUALIFICATION; DECLARATION OF EUGENE J CARELLA, ESQ.; MEMORANDUM POINTS AND AUTHORITIES.

COMES NOW EUGENE J. CARELLA, ESQ., Appellant herein, and does respectfully make formal demand upon the Clerk of the Appellate Department of Los Angeles Superior Court, pursuant to Rule 10.3(c)(5)(6) to notify the Executive Officer of the Judicial Council to have its vice-chairperson appoint a judge free from bias or prejudice or discrimination against Appellant or in favor of Respondent Appellate Department judges as recited in Appellant's Motion for Disqualification identified as EXHIBIT "B" and attached herewith, to adjudicate said Motion for Disqualification in accordance with law and

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to accord Appellant an evidentiary hearing on said disqualific
tion and the right to make argument thereon.

In support of said demand, Appellant respectfully shows his Declaration attached as EXHIBIT "A" herewith and Memorandum of Points and Authorities.

WHEREFORE, Appellant respectfully demands the Clerk forthwith notify the Executive Officer of the Judicial Counci of the necessity of the Judicial Council to act to appoint a judge to adjudicate the moved for disqualification of Judge Alfred Margolis, Jack Newman, Robert Robertson and Fred Woods and after adjudicating order said Appellate Department recuse

DATED: February 15, 1988

BY: _____
EUGENE J. CARELLA, ESQ.

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DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE J. CARELLA, ESQ., declare and state as follow

1. That I am the appellant in the aforecaptioned matter.

2. That on or about February 4, 1988, shortly after learning of the identities for the first time of Appellate Department of Los Angeles Superior Court from the Clerk of Appellate Department, and after also being apprised that Appellate Department acted to deny a Reporters Transcript at public expense, even though indigent, I moved for the immediate disqualification of Judges Alfred Margolis, Jack Newman, Robert Robertson, and Fred Woods on statutory grounds as more fully appears in the Motion for Disqualification identified as Exhibit "B" attached herewith. Said motion was timely filed and served on February 5, 1988.

3. That said disqualification was sought prior to receipt and actual knowledge of an order entered by said Appellate Department on "the merits" of said appeal, which opinion was based in large measure on the lack of evidence in the record to support Appellant's claims and grounds for appeal.

4. That on February 16, 1988, I received a copy of Respondent Judges written verified answer to their disqualif tion and the factual allegations in support of disqualificat said verified answer filed on February 12, 1988 pursuant

EXHIBIT "A"

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Section 170.3(c)(3). Said verified responsesby said judges contains material alterations of facts and material omissions as will be more fully shown at the evidentiary hearing.

5. That each of the Respondent judges is prohibited from passing upon his or her own disqualification or "upon the sufficiency in law, fact, or otherwise of the statement of disqualification filed by a party."

6. That I am unable to agree to another judge with the People of the State of California (the adverse party) as to a judge to adjudicate the disqualification motion.

7. That I further state that I have strong grounds to prevent and disqualify Malcolm Lucas to act in his capacity either as chairperson of the Judicial Council or judge of the Supreme Court in this litigation in that he has acted in prior litigations conducted by me adversely in the federal court system to egregiously abrogate my federal constitutional rights and liberties and is subject to per se recusal by me and proscribed from acting herein in any capacity.

8. That Section 170.3(c)(5) compels that the Clerk of the Appellate Department of the Los Angeles Superior Court forthwith notify the Executive Officer of the Judicial Council to have the Vice Chairperson of the Judicial Council act to select a judge to adjudicate the disqualification if the chairperson is unable (because of disability stated

herein) to act to select a judge free from bias and prejudice

9. That I herewith make an unequivocal demand to have the Clerk of the Appellate Department, Los Angeles Superior Court, act immediately to notify the Judicial Counci of the need to select a judge free from bias, prejudice and discrimination against Appellant or his cause and in favor of Respondent Appellate Department judges to adjudicate Appellant's Motion for Disqualification of Respondent Appella Department attached as Exhibit "B".

10. That I further request the Clerk to advise the Judicial Council of my demand for an evidentiary hearing on the subject motion for disqualification.

11. That I further demand that Respondent Appellate Department Judges Newman, Margolis, Robertson, Woods cease at once from all further conduct and action in the subject appeal.

I declare under penalty of perjury that the above is true and correct to the best of my knowledge and ability.

Executed on this___day of February 1988 in Los Angeles, California.

/S/
EUGENE J. CARELLA, ESQ.

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MEMORANDUM OF POINTS AND AUTHORITIES

Chapter 3: Disqualification of Judges.

Section Nos. 170.1, 170.2, 170.3; 170.4, 170.5, 170.6, 170.7 of the Rules of Court.

CONCLUSION

WHEREFORE, Appellant respectfully demands that the Clerk notify the Judicial Council of the need to select a judge in accordance with law to adjudicate Appellant's Motion for Disqualification, attached herewith as EXHIBIT "B" and his demand for an evidentiary hearing on said motion.

DATED: February 12, 1988

By: EUGENE J. CARELLA, ESQ
Appellant

104

Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-6997 (7)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

EUGENE JOHN CARELLA,
Appellant,

v.

CALIFORNIA,
Appellee.

On Appeal from the Appellate Department of the Superior Court of California, County of Los Angeles

---

JOINT APPENDIX

CHRISTOPHER D. CERF*
(Appointed by this Court)
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Appellant

IRA REINER
District Attorney of the
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HARRY B. SONDHEIM
Head, Appellate Division
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Deputy District Attorney
849 South Broadway
Los Angeles, California 90014
(213) 974-5918
Counsel for Appellee

* Counsel of Record

STATEMENT AS TO JURISDICTION FILED MAY 17, 1988
PROBABLE JURISDICTION NOTED NOVEMBER 7, 1988

80 pp
E
folded

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6/25/85	Criminal Complaint Filed.
1/14/86	Motion for Mistrial.
	Defendant fined for failure to answer question and ordered into custody.
	Court finds defendant financially qualified for public defendant.
2/6 /86	Notice of Motion to Dismiss Complaint.
	Notice of Motion to Declare Presumption Unconstitutional.
3/7 /86	Motion to Dismiss Denied.
	Motion to Declare Presumption Unconstitutional denied.
3/17/86	Jury Sworn.
	Defendant found in contempt and fined.
3/19/86	Defendant found in contempt and taken into custody.
3/20/86	Defendant moves to dismiss at close of State's case.
	Motion denied
3/21/86	Jury instructed and retires to deliberate.
3/24/86	11:17 a.m. Jury returns with question.
	Partial jury instructions read. Jury retires to deliberate at 11:25 a.m.
	11:34 a.m. Jury returns verdict: Guilty on Count I and Not Guilty on Count II.
4/7 /86	Sentence imposed.
9/8 /86	Defendant arrested and imprisoned for probation violation.

DATE	PROCEEDINGS
8/17/87	Trial court certifies Settled Statement on Appeal.
9/8 /87	*Defendant moves to strike settled statement.
9/30/87	*Motion to Strike Denied.
1/26/88	*Defendant files motion for transcript.
1/28/88	Motion for Transcript denied.
2/3 /88	Memorandum, Opinion & Order filed.
2/18/88	*Motion for Rehearing and Application for Transfer.
2/21/88	Motion and Application denied.

* Not reflected on Docket Sheet but pleading is in Record and is reprinted in Joint Appendix.

IN THE MUNICIPAL COURT
OF BEVERLY HILLS JUDICIAL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

No. M83675

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

EUGENE JOHN CARELLA,
Defendant.

Filed Pursuant to Section 17b4

COMPLAINT

MISDEMEANOR

Personally appeared before me this 24th day of June, 1985 A. Munoz-Flores, BHPD of the County of Los Angeles, who being first duly sworn on oath, upon information and belief complains and says:

That on or about the 3rd day of May, 1985, at and in the County of Los Angeles, State of California, the crime of GRAND THEFT AUTO, in violation of Section 487 (3), Penal Code of California, a misdemeanor, was committed by EUGENE JOHN CARELLA who did willfully and unlawfully take a certain automobile then and there the personal property of MPG Car Rental.

COUNT II

For a further and separate cause of complaint, being a different offense from, but connected in its commission

with, the charge set forth in Count I hereof, complainant further complains and says:

That on or about the 3rd day of May, 1985, at and in the County of Los Angeles, State of California, the crime of UNLAWFUL TAKING OF A VEHICLE, in violation of Section 10851, (a) Vehicle Code, a misdemeanor was committed by EUGENE JOHN CARELLA who did willfully and unlawfully drive and take a certain vehicle, then and there the personal property of MPG CarlRental without the consent of and with intent to deprive the said owner of title to and possession of said vehicle.

Subscribed and sworn to before me on June 24, 1985.

/s/ A. Munoz-Flores
A. MUNOZ-FLORES

/s/ [Illegible]
Judge of the above entitled Court

Filed June 25, 1985

IN THE MUNICIPAL COURT
OF BEVERLY HILLS JUDICIAL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

No. M83675

(Title Omitted in Printing)

JURY INSTRUCTIONS

☒ GIVEN

☐ REFUSED

Filed Mar. 21, 1986

S. M. SEIDLER
Clerk

By J. TAUGER
Deputy Clerk

(g) Unlawful Taking of Automobile

Analysis

Inst. No.

Grand Theft of an Automobile (1979 Revision) 14.35

Vehicle Taking—Violation of Vehicle Code Section 10851 (1979 Revision) 14.36

Auto Taking—When Acts May Constitute Either of Two Crimes (1972 Revision) 14.37

CALJIC 14.35 (1979 Revision)

GRAND THEFT OF AN AUTOMOBILE

[Defendant is charged in [Count 1 of] the information, with the commission of the crime of grand theft, a violation of Section 487 of the Penal Code.]

Every person who steals, takes or drives away the automobile of another with the specific intent to deprive him permanently of his property, is guilty of the crime of grand theft of an automobile.

In order to prove the commission of such crime, each of the following must be proved:

1. That a person took or drove away the automobile belonging to another person, and

2. That when such person took or drove away the automobile he had the specific intent to deprive the owner permanently of his property.

CALJIC 14.36 (1981 Revision)

VEHICLE TAKING—VIOLATION OF VEHICLE CODE SECTION 10851

[Defendant is charged in [Count 2 of] the information, with the commission of the crime of violation of Section 10851 of the Vehicle Code.]

Every person who drives or takes a vehicle not his own, without the consent of the owner, and with specific intent to deprive the owner either permanently or temporarily of his title to, or possession of, the vehicle, whether with or without intent to steal the same, is guilty of the crime of violation of Section 10851 of the Vehicle Code.

In order to prove the commission of such crime, each of the following elements must be proved:

1. That a person took or drove a vehicle belonging to another person,

2. That the other person had not consented to such taking or driving of his vehicle, and

3. That when such person took or drove the vehicle he had the specific intent to deprive the owner either permanently or temporarily of his title to or possession of the vehicle.

CALJIC 14.37 (1972 Revision)

AUTO TAKING—WHEN ACTS MAY CONSTITUTE EITHER OF TWO CRIMES

The unauthorized taking or depriving by one person of the automobile of another may, depending upon the facts, constitute either of two crimes.

The defendant is charged in Count 1 with grand theft. Every person who steals, takes or drives away the automobile of another with the specific intent to deprive the owner permanently of his property is guilty of grand theft regardless of the value of the automobile.

The defendant is charged in Count 2 with a violation of Section 10851 of the Vehicle Code which provides that any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with the specific intent to either permanentiy or temporarily deprive the owner of his title to or possession of such vehicle, is guilty of a public offense.

The distinction between the offenses is in the type of specific intent required:

1. To constitute the crime of grand theft there must be a specific intent to permanently deprive the owner of his property.

2. To constitute a violation of Vehicle Code Section 10851 there must be a specific intent to either permanently or temporarily deprive the owner of his title to or possession of the vehicle.

The defendant may be found not guilty of both counts. If you find him guilty as charged in either of the two counts, you must find him not guilty of the other.

If you are convinced beyond a reasonable doubt that defendant is guilty of one of the two counts but you have a reasonable doubt as to which of the two counts defendant is guilty, it is your duty to find him guilty of a violation of Section 10851 of the Vehicle Code as charged in Count 2.

D. MISTAKE

Analysis

	Inst. No.
Ignorance or Mistake of Fact	4.35
Ignorance or Mistake of Law (1979 Revision)	4.36

CALJIC 4.35

IGNORANCE OR MISTAKE OF FACT

An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime.

Thus a person is not guilty of a crime if he commits an act or omits to act under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful.

PART 14

CRIMES AGAINST PROPERTY

A. THEFT

(a) Forms of Theft

Analysis

Inst. No.

Theft—Forms of 14.00

CALJIC 14.00

THEFT—FORMS OF

The crime of theft may consist of (1) theft by larceny, (2) theft by trick and device, (3) theft by embezzlement, or (4) theft by false pretense.

(c) Trick and Device

Analysis

Inst. No.
Theft by Trick and Device—Defined (1979 Revision) 14.05

CALJIC 14.05 (1979 Revision)

THEFT BY TRICK AND DEVICE—DEFINED

[Defendant is charged in [Count 1 of] the information, with the commission of the crime of grand theft, a violation of Section 487 of the Penal Code.]

Every person who obtains possession of personal property of another by means of false promises without intention to perform or by means of fraud, artifice, trick or device with the specific intent to deprive another person permanently of his property, is guilty of the crime of theft by trick and device.

In order to prove the commission of theft by trick and device, each of the following elements must be proved:

1. That a person obtained possession of personal property of some value belonging to another person,

2. That such person obtained possession by making [a] false promise[s] which he had no intention of performing or by means of other fraud, artifice, trick or device,

3. That in surrendering possession of such property, the other person did not intend to transfer the ownership, and

4. That the person who obtained possession did so with the specific intent to deprive the other person permanently of his property.

(d) Embezzlement

Analysis

	Inst. No.
Theft by Embezzlement—Defined (1979 Revision)	14.07
Embezzlement—Trustor May Be Agent for Owner	14.08

CALJIC 14.07 (1979 Revision)

THEFT BY EMBEZZLEMENT—DEFINED

[Defendant is charged in [Count 1 of] the information, with the commission of the crime of grand theft, a violation of Section 487 of the Penal Code.]

Every person to whom property has been entrusted who fraudulently appropriates such property to his own use or purpose, is guilty of the crime of theft by embezzlement.

In order to prove the commission of theft by embezzlement, each of the following elements must be proved:

1. That a relation of trust and confidence existed between two persons,

2. That pursuant to such relationship one of those persons accepted property entrusted to him by the other person, and

3. That with the specific intent to deprive the other person of his property, the person fraudulently appropriated or converted it to his own use or purpose.

*CALJIC 14.08

EMBEZZLEMENT—TRUSTOR MAY BE AGENT FOR OWNER

If you find that money or property was entrusted to the defendant, and thereafter was fraudulently appropriated by him, it is immaterial whether such money or property was entrusted to the defendant by the owner directly or by a third person acting for the owner.

(f) Degrees of Theft

Analysis

Inst. No.

Grand and Petty Theft—When Distinction Depends on Value ($400, Point of Demarcation) (1983 Revision) ..14.21

Grand and Petty Theft—When Distinction Depends on Value ($100, Point of Demarcation) (1983 Revision) ..14.22

Grand and Petty Theft—Theft by Agent, etc., Over $400, in Twelve-Month Period (1983 Revision) ..14.25

CALJIC 14.21 (1983 Revision)

GRAND AND PETTY THEFT—WHEN DISTINCTION DEPENDS ON VALUE ($400, POINT OF DEMARCATION)

When property such as that alleged to be involved in this case is taken by theft, if the value of the property exceeds four hundred dollars, the crime is grand theft; if the value is four hundred dollars or less, the crime is petty theft.

* * * *

PEOPLE'S SPECIAL INSTRUCTION #1

Presumption Respecting Theft by Fraud

Intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

Penal Code Section 484 (b)

PEOPLE'S SPECIAL INSTRUCTION #2

Presumption Respecting Embezzlement of a Leased or Rented Vehicle

Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

Vehicle Code Section 10855

PEOPLE'S SPECIAL INSTRUCTION #3

Manifestation of Intent

The intent or intention is manifested by the circumstances connected with the offense.

Penal Code Section 21 (a)

Intention to defraud: sufficiency

Whenever an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or corporate, whatever.

Penal Code Section 8

PEOPLE'S SPECIAL INSTRUCTION #4

This case is not a criminal prosecution for a civil debt.

People v. Carr, 229 Cal App 2d 74, 77 Vehicle Code Section 10851 and 10855

CALJIC 16.000 (1979 Revision)

COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS

I

Duties of Judge and Jury

Ladies and Gentlemen of the Jury:

Now we come to that part of the trial where you will be instructed on the law.

Whether a defendant is to be found guilty or not guilty depends upon both the facts and the law.

As jurors you have two duties to perform in order to reach a verdict. One duty is to determine the facts of the case from the evidence received in the trial and not from any other source. The word "fact" means something that is proved directly or circumstantially by the evidence.

Your other duty is to apply the law to the facts as you determine them and in this way to reach your verdict.

It is my duty in these instructions to explain to you the law that applies to this case. You must accept and follow the law as I state it to you.

You must not be influenced by pity for a defendant or by prejudice against him.

You must not be biased against the defendant because he has been arrested; charged with a crime or brought to trial. These facts are not evidence of his guilt.

You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

II

Composition of Instructions

The instructions are to be considered as a whole and each individual instruction is to be considered in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

For simplicity, the masculine form of pronoun as used in the instructions applies equally to all persons.

III

Statements of Counsel, etc.

You must not consider any statement by either attorney as evidence. If the attorneys have agreed to any fact or if any fact has been admitted, that fact is proved.

You must not consider as evidence any offer of proof that was rejected or any evidence that was stricken out.

As to any question to which an objection was sustained you must not guess what the answer might have been.

You must not assume to be true any insinuation suggested by a question asked a witness.

IV

Direct and Circumstantial Evidence

Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact.

Circumstantial evidence is evidence that proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

* * * *

CALJIC 16.000 (1979 Revision)

COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS

VII

Credibility of Witness

Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given to his testimony.

In determining the believability of a witness, you may consider anything which tends in reason to prove or disprove the truthfulness of his testimony, such as: his conduct, attitude and manner while testifying; his capacity to hear or see that about which he testified and his ability to recollect or to relate such matters; whether or not there was any bias, interest or other motive for him not to tell the truth; [any statement previously made by him that was consistent with his testimony] [or,] [any statement previously made by him that was inconsistent with his testimony;] [his character for honesty or veracity or for dishonesty or untruthfulness;] [any admission by him that he did not tell the truth;] [his prior conviction of a felony].

If you believe that a witness willfully testified falsely as to a material fact, you should distrust the rest of his testimony and you may disregard all of his testimony.

However, you should bear in mind that discrepancies in a witness's testimony or between his testimony and that of others, if there were any, do not necessarily mean that you should disbelieve the witness, because forgetting is common and innocent mistakes are not unusual. Two persons witnessing the same incident often see or hear it differently.

You also should consider whether any such discrepancy concerns an important fact or only a trivial detail.

• • • •

XI

Presumption of Innocence and Burden of Proof

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows:

It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

* * * *

XIV

[Specific Intent]

[In the offenses with which the defendant is charged [in Counts 1 and 2,] there must be a joint operation of act or conduct and the required specific intent and unless such specific intent so exists that offense is not committed.]

XV

Take No Cue from Judge

I have not intended by anything I have said or done or by any question I may have asked to suggest what you should find the facts to be or that I believe or disbelieve any witness.

If anything I have said or done has seemed to suggest my opinion as to the facts, you will disregard it and form your own opinion.

XVI

Duty to Deliberate

When you start your deliberations, it is important that you avoid expressing a fixed opinion or a determination to hold out for a certain verdict.

Each of you must decide the case for yourself but should do so only after an open-minded discussion of the evidence and instructions with the other jurors.

Once you have reached a conclusion, you should not change it merely because other jurors disagree with you. However, if you become convinced you have reached a wrong conclusion, you should not hesitate to change it.

You should remember in deciding this case, that you are not advocates or partisans for either side but that you are the impartial judges of the facts.

XVII

Avoid Considering a Penalty

In your deliberations, or in arriving at a verdict, you must not discuss or consider the subject of penalty or punishment. That is a matter which must not in any way affect your decision.

XVIII

Concluding Instruction

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to reach a verdict, all twelve jurors must agree to the decision [and to any finding you have been instructed to include in your verdict]. As soon as all of you have agreed upon a verdict, you shall have it dated and signed by your foreman and then shall return with it to this courtroom.

3/24/86

11:05 AM

In Count 1, does the presumption of 'intent', as stated by the Court, include the legal requirement of 'permanent deprivation of possession'?

~~Is~~ it considered permanent if he keeps the car over 5 days of the contract date? Or 30 days?

QUESTION FROM JURY

Williamson & Williamson

7449 MELROSE AVENUE, LOS ANGELES, CA 90046

IN THE MUNICIPAL COURT
OF BEVERLY HILLS JUDICIAL DISTRICT
COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

(Title Omitted in Printing)

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; DECLARATION OF EUGENE J. CARELLA, ESQ. IN SUPPORT THEREOF; MEMORANDUM OF POINTS AND AUTHORITIES

TO: DISTRICT ATTORNEY OF LOS ANGELES COUNTY AND HIS DULY-AUTHORIZED DEPUTIES.

PLEASE TAKE NOTICE that at 9:00 A.M. in Division 5 of the above-entitled court, Defendant EUGENE JOHN CARELLA will move the Court for an Order dismissing the subject complaint with prejudice. Said motion will be based upon grounds as appearing herein and is further based upon this notice, Declaration of Eugene John Carella—together with all papers, pleadings, transcripts, records, and the like on file herein, and such oral and documentary evidence as may be presented at the hearing on said motion.

DATED: January 10, 1986

By: /s/ Eugene J. Carella
EUGENE J. CARELLA

DECLARATION OF EUGENE JOHN CARELLA

I, EUGENE JOHN CARELLA, declare and state as follows:

1. That the following declaration is made for purposes of this motion only and by its making I waive no constitutional right, or other right, state or federal, accruing to me.

2. That I am the defendant in the aforecaptioned matter.

3. That at no time was I ever furnished, or did I ever receive, or have in my possession, control, dominion or the like, title to the vehicle which is the subject of the instant complaint, nor was I ever permitted access or inspection to said document.

4. That the keys to, as well as the subject vehicle, were voluntarily and consentually furnished to me by MPG Car Rental and with the permission of its duly-authorized agents/employees on or about March 27, 1985 in Beverly Hills, California.

5. *That at no point in time* was I ever informed, or did I have knowledge that, MPG revoked its consent or permission accorded me with respect to said vehicle.

6. That at all material times the subject vehicle was parked daily at my residence located at 10776 Wilshire Boulevard and was otherwise accessible to MPG Car Rental personnel from 9:00 PM to 10:00 AM each successive day, said residence being approximately 1½ miles from MPG Car Rental offices, the exact location of said defendant's residence *at all times being known to MPG Car Rental and its employees.*

7. That at no point in time did I ever have any intent whatsoever to willfully and unlawfully take the subject vehicle nor did I ever have any intent whatsoever to,

or did I in fact, willfully and unlawfully drive and take the subject vehicle without the consent of and with intent to deprive said owner of title to and possession of said vehicle as charged, and that I do not know of nor have I ever heard of Ciera or Ciero Car Rental.

8. That on June 5, 1985 I contacted Detective Richard Schwab of the Beverly Hills Police Department in response to a telephone call received at my residence on June 3, 1985 and spoke to a Jennifer Ayres of the Beverly Hills Police Department who advised me said Detective Schwab was on an extended vacation. I then informed her as to my address, telephone number, and the fact that I was a federal practitioner who practiced in numerous federal courts and to have Detective Schwab contact me upon return from his vacation.

9. That I received no contact whatsoever from any personnel of the Beverly Hills Police Department after my June 5, 1985 contact until I was falsely arrested at my residence while I was asleep in the early morning hours on June 27, 1985.

10. That I am the only person authorized to receive or sign for certified or registered mail and at no point in time did I ever sign for any correspondence from MPG Car Rental or its duly-authorized employees.

11. That at all material times commencing on or about March 27, 1985 MPG Car Rental had actual knowledge of my residence address and telephone number and the location of the subject vehicle and knew that I was a permanent resident at that location and had been for approximately two years.

Executed under penalty of perjury in Los Angeles, California this 10 day of January 1986.

/s/ Eugene John Carella
EUGENE JOHN CARELLA

MEMORANDUM OF POINTS AND AUTHORITIES

Preliminary Statement

Defendant, EUGENE J. CARELLA, Esq., a federal practitioner, rented an automobile, the subject of this complaint, pursuant to a civil contract on or about March 27, 1985. On June 27, 1985 Defendant was falsely arrested at his residence, which location was known to MPG Car Rental and the Beverly Hills Police Department as being a little more than a mile from the MPG rental offices. Defendant was falsely charged with Grand Theft Auto Theft and Unlawful Taking of Vehicle and a misdemeanor complaint improperly lodged against him.

Discussion

(Count II)

The documents filed by The People supporting their misdemeanor complaint verifys that Defendant is charged in Count II thereof with unlawfully taking of a vehicle, e.g., "who did willfully and unlawfully drive and take a certain vehicle then and there the personal property of Ciero Car Rental without the consent of and with intent to deprive the said owner of *title to and possession of said vehicle.*" (emphasis added).

The charge against Defendant in Count II *is conjunctive.* Defendant demonstrates conclusively that he in no way had control, dominion, custody or knowledge of the legal title to the subject vehicle, nor did he even know or hear of said legal owner. Accordingly, in light of these evidentiary facts it is impossible for Defendant to have been able to deprive said owner of his or her legal title. This irrefutable fact renders Count II of the subject complaint fatally infirmed and defective and requires that it be forthwith dismissed with prejudice or stricken in the alternative.

Discussion

(Count I)

As more fully appears from The People's supporting documents incorporated in the misdemeanor complaint herein, MPG Car Rental knowingly sent a letter to Defendant's old residence address (and never received by defendant) even though MPG had actual knowledge of defendant's true and correct address. On or about March 27, 1985 when they furnished defendant the subject vehicle with their permission and consent. Defendant has stated and shown in his declaration that MPG had freely, voluntarily, consentually furnished him the subject vehicle, and that at no point in time did defendant have any knowledge that MPG had withdrawn its permission or consent. Further, defendant's declaration evidences a clear lack of intent by defendant to willfully and unlawfully take the subject vehicle, and, in point of fact, the subject vehicle was parked religiously each and every night at his residence from 9:00PM to 10:00AM of the following morning, making it accessible to MPG for inspection, access or the like. The fact that MPG Car Rental officers were a little more than a mile from defendant's residence where the vehicle was located each night is further compelling evidence that dispels and vitiates any criminal intent or specific intent by defendant to commit the acts charged in the complaint and further command that Count I be dismissed with prejudice or stricken in the alternative.

CONCLUSION

Defendant, a federal practitioner, who with the consent and permission of MPG Car Rental was furnished the subject vehicle falsely and maliciously arrested on June 27, 1985. There was no intent whatsoever by defendant to unlawfully or willfully take the subject vehicle nor was there any intent to deprive the legal owner

of its title or possession. At all times to defendant's knowledge the consent and permission of MPG Car Rental was efficacious, and that at all material times the subject vehicle was located at his residence in Westwood and capable of being easily inspected or accessed by MPG Car Rental, which residence was known by MPG Car Rental and was only a mile or so from their offices. There is no basis for the invocation of the criminal process with respect to the matters before the Court, inasmuch as they are purely and simply a function of civil contractual law and should be adjudicated in accordance with said procedures for customary contractual resolution.

Accordingly, for all the foregoing reasons, Defendant respectfully moves that Count I and Count II of the instant misdemeanor complaint be dismissed with prejudice and otherwise stricken.

DATED: January 10, 1986

By: /s/ Eugene John Carella
EUGENE JOHN CARELLA
Defendant

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this the 6 day of February 1986 I served a true copy of the foregoing NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT, etc. by personal delivery on the following:

Deputy District Attorney
BEVERLY HILLS MUNICIPAL COURTHOUSE
Burton Way
Beverly Hills, California

/s/ Eugene John Carella

MUNICIPAL COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
BEVERLY HILLS JUDICIAL DISTRICT

(Title Omitted in Printing)

Filed August 14, 1987

PROPOSED SETTLED STATEMENT ON APPEAL; PARTICULARIZED GROUNDS ON APPEAL

Appellant appeals from a misdemeanor conviction of Grand Theft Automobile following a jury trial. Appellant originally filed a proposed settled statement. The People filed a response to the proposed settled statement. In December 1986, on the date of the settling of the statement, Appellant failed to appear.

The Court accepted the People's statement of facts as the settled statement.

Appellant filed an objection to the settled statement. The Appellate Department of the Superior Court remanded the settled statements by the trial court because grounds of appeal were missing and specific portions of record were not referred to.

Appellant failed to appear on June 12, 1987, the date of the new settling of the statements on appeal. The Court ordered a warrant for appellant's arrest, setting the bail at $10,000.

A new date of August 12, 1987 had been set for a settling of the statement of appeal. Defendant failed to appear.

It should be noted that it is the appellant who is appealing, not the People. Therefore, the grounds of appeal would not be supplied by the People. However, since it is unclear whether Appellant will appear at the hearing on August 12, 1987, the People will include in this proposed statement on appeal, in its entirety the grounds which appellant initially provided. Since these are appellant's grounds of appeal, the People cannot supplement them in any way.

The following is the appellant's grounds on appeal taken from his original proposed statement on appeal.

GROUNDS ON APPEAL

1. Appellant's right to a speedy trial guaranteed by state and federal constitutions was grossly abridged by the Court's denial of Appellant's Motion for Mandatory Dismissal pursuant to Section 1382 of the Penal Code, and said denial constitutes reversible error.

2. The trial court's failure to stand recused and disqualified in accordance with Appellant's Disqualification Petition and its failure to permit Petition *to be filed* or lodged constitutes reversible error.

3. Trial court's extreme and gross bias and hatred against Appellant and in favor of the People—including threats of oppression, incarceration and punitive fines—deprived Appellant his right to receive a fair trial and other Constitutional rights.

4. Court's refusal to dismiss the Complaint and declare the statutory presumptions contained in Section 10855 of Vehicle Code and 484 of the Penal Code unconstitutional, constitutes an abuse of discretion and reversible error.

5. Trial court's refusal and failure to instruct the jury in accordance with Appellant's Written Jury Instructions and Charges filed by Appellant on March 18,

1986 and its failure to make any *sua sponte* instructions regarding Appellant's defense that "legal title and permission to the subject vehicle was entrusted to him pursuant to written contract" constitutes infirming reversible error.

6. Trial court's instruction to the jury over Appellant's continuing objection with respect to the presumptions contained in Vehicle Code Section 10855 and Penal Code Section 484, deprived Appellant of his Constitutional rights to a jury trial and fair trial and otherwise constitutes fatal reversible error.

7. Trial court's refusal to admonish and prohibit the prosecution for its misconduct in presenting prejudicial charts and graphs *not in evidence* to the jury and prosecutor's reference to such documents through the course of the trial and other prosecutorial misconduct constitutes infirming reversible error and denied Appellant's right to a fair trial.

8. Trial court's failure to grant Appellant's Motion to Dismiss on the grounds that the subject criminal proceeding is a prosecution for a "civil debt," for enforcement of a "civil contract," constitutes reversible error.

9. The court's refusal to dismiss the complaint on the grounds that the statutes in question are void for vagueness and ambiguity thereby denying Appellant his due process rights constituting reversible error.

10. Trial court's refusal to grant Appellant's Motion to Dismiss at close of People's case on the basis of insufficient evidence constitutes reversible error.

11. Trial court's refusal to grant Appellant's Motion for Mistrial and for Motion for Judgment Notwithstanding the Verdict constitutes prejudicial, reversible error and gross abuse of discretion.

12. Trial court's refusal to strike People's Jury Instructions or to Accord Appellant Hearing on Jury

Instructions constituted prejudicial reversible error and abuse of discretion.

13. Trial court's refusal to grant Appellant a Probation Hearing and accord him a Pre-Sentencing Report after it had set the matter for probationary hearing on *May 13, 1986*—together with arbitrary and capricious pre-sentencing conditions and revocation of Appellant's own recognizance status and placing him under excessive bail and physical danger constituted a denial of due process of law and is reversible error.

14. Trial court's denial of Appellant's Motion for Judgment in Arrest of Proceedings for Fraud and Trial Irregularities, including jury tampering and constituted reversible error.

15. Court's failure to properly arraign Appellant on the subject charges—together with the failure of the Court to properly discharge its duties to Appellant at arraignment of sentencing and judgment denied Appellant his right to a fair trial.

16. Trial court's refusal to permit inquiry and questioning by Appellant into juror pool and the undue voir dire restriction into bias and conflict of interests of jurors constitutes infirming reversible error.

17. The trial court *ex parte*, in collusion with The People, conspired to fix the jury pool and jurors assigned to the case, and the jury verdict entered on March 24, 1986 was secured by fraud, trickery, deceit and conspiracy between the trial court and the People and various jurors and alternate jurors.

18. The verdict of the jury entered on March 26, 1986 is unsupported by any evidence and was the product of a common enterprise to harm Appellant irreparably and his reputation and livelihood and secured by fraud.

19. The trial court's denial of Appellant's Motion For a New Trial constituted infirming reversible error.

20. The trial court's failure to admit Appellant's evidentiary exhibits and/or Take Mandatory Judicial Notice of Legal Proceedings in which Appellant was participating in California and other forums constituted infirming reversible error.

21. Trial court's refusal to Strike People's Evidentiary Exhibits that were NOT properly authenticated constituted infirming reversible error and should have been suppressed.

22. The trial court's imposition of sentencing Appellant to six (6) months in County Jail with no probation —together with three (3) years of parole—is a cruel, unusual punishment and in excess of the statute and unconstitutional, and must be vacated forthwith, especially in light of the fraud associated with the subject sentencing to prevent Appellant from prosecuting other matters as an attorney and/or plaintiff.

23. For such further grounds as appear from the transcript of evidence and/or proposed statement filed herein, including but not limited to, the fact that the subject arrest and consequent proceedings were a fraud, nullity and carried out in total absence of any probably cause and trial court's refusal to dismiss proceedings were in concert with third parties to harm and falsely imprison Appellant.

The following is the People's proposed statement on appeal which has been certified by the court as the settled statement on appeal:

On March 25, 1985, EUGENE JOHN CARELLA rented a car from MPG Car Rental, located in Beverly Hills, from Jessica Patricio. The rental agreement was for 30 days. The agreement signed by Appellant included in it the legal obligation to return the automobile on the agreed date. The next day on March 26, 1985, Appellant exchanged the car for another and signed an agreement to return the car on April 26, 1985.

Appellant extended by telephone the rental agreement until May 3, 1985. Appellant did not return the car on May 3, 1985. The owner of MPG, Galil Yaacov, telephoned Appellant numerous times. He even went to the location listed as Appellant's business but was never able to contact Appellant. It was discovered that Appellant did not live at the address he listed on the rental agreement as his residence. Appellant actually resided at the address which he listed on the rental agreement as his business.

Appellant never returned any of the phone messages left by MPG owner, Yaacov. Mr. Yaacov sent registered letters to both addresses listed by Appellant on the rental agreement. The letter addressed to the location listed as his residence on the rental agreement was returned by the post office as stating on the letter, "Moved with no forwarding address." The demand letter sent to the address left by Appellant as his business address on the rental agreement was not returned by the post office.

Mr. Yaacov continued to telephone Appellant at the number left as his business but later found to be a hotel. His calls were not returned. Mr. Yaacov asked the person taking the messages, the hotel clerk, if Appellant was receiving the messages that he was sending. The clerk stated that Appellant was receiving the messages. The registered letter dated May 16, 1985, demanded the immediate return of the car or the matter would be turned over to the police.

On June 3, 1985, Mr. Yaacov reported the theft of the car to the Beverly Hills Police Department. Beverly Hills Detective Schwab left messages to Appellant but they were not returned. An arrest warrant was obtained and on June 27, 1985, Appellant was arrested and the car was recovered in the adjoining parking lot of the address which Appellant listed as his business address.

The car had an excessive amount of mileage on it from the date rented. The brakes were worn down so low that they needed replacement. The car also had minor dents around the body. At no time did Appellant ever contact the MPG rental office after he extended the return of the car rented car to May 3, 1985. Appellant never paid for the use of the car other than the initial $400 deposit.

Two witnesses testified for the defense. The first was Appellant's fiancee. She testified that at the time of the events of this case, she was living with Appellant at the address he listed on the rental application as the business address. She testified that she didn't remember receiving any messages to return the rented car, although she normally left the "message gathering" duties to Appellant.

She testified that on a Saturday, May 11, 1985, she remembers going to a gas station to fill up the rented car with gas, accompanied by Appellant. It was in the evening hours and close to the MPG rental office.

She knew that Appellant has a large amount of cash on him at the time. She did not know what he was going to do with the money. She stated that she normally rode the bus and not in Appellant's rented car. She knew nothing of the rental agreement. She believed there was a consipracy against Appellant and herself which involved the Central Intelligence Agency and the Beverly Hills Police Department.

The second witness to testify for the defense was Jennifer Avres who was employed as a cadet at the Beverly Hills Police Department. She stated that as a part of her duties, she would occasionally answer the telephone. She said that she did work on June 3, 1985 and that she had no memory of whether Appellant telephoned Detective Schwab.

After a jury trial, Appellant was convicted of Grand Theft Auto as a misdemeanor, Penal Code Section 487 (2) and acquitted of Unlawful Taking of a Vehicle, Vehicle Code Section 10851. Appellant was sentenced to six months of county jail and three years formal probation.

Respectfully submitted

IRA REINER
District Attorney of
Los Angeles County

By

/s/ Helen Woznak for
GREGORY ALARCON
Deputy District Attorney

IN THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Appeal No. CRA 24001

LAMC M 83675

EUGENE JOHN CARELLA,
Petitioner/Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent/Plaintiff.

APPELLANT'S MOTION TO STRIKE "SETTLED STATEMENT" AS FRAUD AND SHAM AND TO VACATE JUDGMENT AND SENTENCING; DECLARATION OF EUGENE J. CARELLA, ESQ; MEMORANDUM OF POINTS AND AUTHORITIES

Filed September 8, 1987

TO: THE JUDGES OF THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

COMES NOW Appellant, EUGENE JOHN CARELLA, ESQ., pursuant to the Rules of Court and applicable provisions of Appellate Procedure, and does hereby move this Court for an order striking as fraud and sham the settled statement purportedly certified by the trial court on or about August 17, 1987, as more fully appears in *EXHIBIT "F"* attached herewith *(more than ten (10) months after Appellant filed his timely Proposed Settled*

Statement and Particularized Grounds on Appeal). Appellant also moves this Court for an order vacating the judgment and sentencing of the trial court entered on April 7, 1987, as a matter of law.

In support of said motion, Appellant respectfully shows as grounds that the actions of the trial court are grossly violative of the Rules of Court, are not in conformity with the applicable authorities and rulings, and are otherwise designed and calculated to frustrate and deprive Appellant of a meaningful appellate review and complete record on appeal, and otherwise undertaken with a purpose to deny Appellant proper appellate review, in contravention of the due process and equal protection provisions of the state and federal constitutions.

Said motion is based upon all papers, pleadings, records, documents, declarations, and the like on file in the aforecaptioned matter—together with such additional evidence and materials as may be further adduced by Appellant, together with the Memorandum of Points and Authorities attached herewith.

WHEREFORE, based upon the gross irregularities and post trial misconduct by the trial court as evidenced herein seeking to obfuscate her criminal actions at the time of trial to the present from active appellate consideration by this Court by obstructing Appellant's right to trial transcripts of evidence or to a true and correct settled statement, and to perfect a true and sufficiently complete Clerk's Record on Appeal, Appellant respectfully moves the settled statement of the trial court be forthwith stricken and the judgment and sentencing of April 7, 8, 1986, vacated; and for such further and additional relief deemed necessary and proper.

Dated: August 31, 1987

By: /s/ Eugene J. Carella,
EUGENE J. CARELLA, ESQ.
Appellant-Petitioner

DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE J. CARELLA, ESQ., declare and state as follows:

1. That I am the appellant herein.

2. That I am vigorously and resourcefully prosecuting the instant appeal, but have been substantially impeded and abridged by the trial court's misconduct from securing the trial transcripts of evidence and a "true and correct statement on appeal" in violation of Rule 184 of the California Rules of Court and from securing a true and complete record on appeal in violation of Rule 183 of the Rules of Court.

3. *That on September 8, 1986,* after a request by this Court (Appellate Department), I *physically* visited the Los Angeles Municipal Court, Beverly Hills Judicial District, located at 9355 Burton Way, Beverly Hills, California, to seek the advices of the Court Reporter, Robert Marsh, concerning the timetable for filing of the trial transcripts, when I was ordered falsely arrested again and imprisoned by Judith O. Stein with the purpose and intent to impede and abridge my prosecution of this appeal and other important substantial litigations being conducted by me in the State of California and other forums.

4. That on September 18, 1986, Acting Presiding Judge Reese of this Court by written order granted me until October 20, 1986, to file a proposed statement on appeal because I had been actively and intentionally frustrated from securing the actual reporters transcripts of evidence of trial proceedings. (Said Order is identified as *EXHIBIT "A"* and attached herewith.)

5. That on October 20, 1986, I filed Appellant's Proposed Statement on Appeal and Particularized Statement of Grounds on Appeal and served a copy on all parties-in-interest and this Court—a true copy of said statement consisting of twenty-six (26) pages of evidence identified

as *Exhibit "B"* and specifically incorporated and attached herewith as *EXHIBIT "B"*.

6. That at *no* point in time did the Respondent District Attorney ever contact me at my business address respecting the proposed statement or furnish me with any amendments to my proposed statement until on or about December 10, 1986—*more than a full month and a half after the statement was filed and well beyond the fifteen (15) days statutorily permitted to Respondent* (see *Rule 185*).

7. Nor did Respondent District Attorney ever receive an extension to file the proposed amendments in violation of *Rule 186* of the Rules of Court, thereby *waiving* the People's right to make modifications, changes, or corrections in the proposed statement.

8. That in late November 1986, I learned from the Clerk of the Municipal Court that notwithstanding my continuing recusal and disqualification of Judith O. Stein commencing on March 18, 1986 when written recusal was sought and despite her refusal to permit me to *file or lodge* said written disqualification, and despite no less than twenty (20) subsequent demands that said Judith Stein cease and desist in any and all further conduct in the trial or post trial proceedings, she intended to proceed to settle the statement on appeal.

9. That on December 5, 1986, I immediately moved this Court for a writ seeking to prohibit Judith O. Stein from acting any further because of the disqualification, and because I specifically cited her disqualification as a grounds for appeal, and because a "disqualified" judge is barred from setting the record (*Rule 187*).

10. That notwithstanding the express statutory prohibition against a disqualified judge from acting to settle and/or certify the statement and notwithstanding Judith Stein's disqualification being a paramount ground for this appeal, Abby Soven of this Court, acting as Depart-

ment 70 judge, in gross derogation and in abuse of her office, denied my writ on the grounds that it was "premature," despite *present irreparable injury to my statutory rights* (as more fully appears in LASC No. C-627582.)

11. That on January 12, 1987, I learned of an order issued by said disqualified trial judge "certifying" that Respondent District Attorney's Response filed "*out of time*" by more than a month and a half would "constitute the settled statement on appeal," a copy of said "certified settled statement" is identified as *EXHIBIT "C"* and attached herewith.

12. That on January 22, 1987, I filed a motion to strike the "certified settled statement on appeal" on the grounds that the People had *waived* their right to modify the proposed statement filed by Appellant on October 20, 1986, by their untimely response (see *EXHIBIT "D"* dated December 8, 1986), and that the statement was not in conformity with the Rules of Court and was a gross and fraudulent misrepresentation of evidence and facts adduced at trial, and otherwise *void ab initio*, and that said acts (of settlement) by the trial court were in furtherance of a criminal conspiracy to abrogate my civil and constitutional rights and liberties guaranteed by the state and federal constitutions.

13. That on February 24, 1987, in response to Appellant's motion to strike referenced above filed on January 23, 1987, the Court entered a *remand order* admonishing the trial court of its *mandatory obligations* that "said settled statement *shall include appellant's grounds on appeal and the evidence pertaining thereto*" as more fully appears in *EXHIBIT "E"* attached herewith. Further, the Court specifically apprised the trial court of the format to be followed, citing *People v. Jenkins*, 55 Cal. App. 3d Supp. 55 (1976), and gave a time deadline of thirty (30) days from the issuance of the order on February 24, 1987, to have the statement settled.

14. That I contacted the Appellate Department in April and May of 1987 regarding receipt of the settled statement, and was advised none was received.

15. That I contacted the Appellate Department specifically on June 18, 1987, June 30, 1987, July 10, 1987 and August 18, 1987, and advised the Clerk that my constitutional due process rights to a meaningful and expeditious appellate review were being aggrieved irreparably by inordinate delay.

16. That on August 26, 1987, I contacted the Clerk of the Appellate Department and learned that finally (six (6) months *after* this Court had ordered her to do so) the trial court certified a settled statement, but that a copy was not served upon me (appellant) or furnished me by the trial court as required by law. I requested a copy from the Appellate Department.

17. That a true and correct copy of said settled statement is identified as *EXHIBIT "F"* and attached herewith.

18. That at *no point in time* since filing my Notice of Appeal have I *ever been advised* by the trial court or clerk of "an order to appear at any hearing" on settlement of the statement or resettlement of the statement in the aforecaptioned appeal, or have I ever received any notice of such an order, written or otherwise.

19. That the statement as settled by the trial court on August 17, 1987, despite specific admonitions and advices from this Court to the trial court, and despite six months of elapsed time, is *exactly* the same as the January 7, 1987 settled statement other than it now contains Appellant's Grounds for Appeal. Further, the statement as settled is a rank fraud.

20. That the trial court's actions are gross and consciously designed to protract the appellant in the process and to foreclose appellant's right to present and perfect

a true and complete appllate record ensuring adequate appellate review by this Court, consistent with Appellant's right to receive a proper appellate hearing guaranteed by the due process provisions of state and federal constitutions.

21. As evidence of the fraudulent nature of the settled statement, Appellant shows that the People (District Attorney) made specific fraudulent statements that no jury instructions or request to charge the jury were ever filed by appellant at the time of trial.

22. That as a grounds for appeal, Appellant states that the trial court *never gave any of Appellant's jury instructions or charges*, which Appellant *filed on March* 18, 1986, identified as *EXHIBIT "G"* attached herewith.

23. That the failure of the trial court to instruct on any of the five (5) requested jury instructions is *per se* infirming and reversible error and grossly abridged Appellant's constitutional right to a fair trial.

24. This is but one illustration of the kind of gross fraud and collusion being carried out by the District Attorney and trial court seeking to obstruct and prevent Appellant from perfecting a true and comprehensive settled statement and record on appeal.

25. That on September 15, 1986, one week after I was falsely arrested at the Beverly Hills Courthouse by Judith Stein and held illegally in custody by her when seeking the trial transcripts from Robert Marsh, I directed a letter to the Justices of this Court requesting they order the subject transcripts *on their own motion* to document the heinous, gross and criminal misconduct and abuse of process by the trial court and District Attorney (a copy of said letter is identified as *EXHIBIT "H"*.)

26. That in view of the trial court's active and willful interference with my right to secure an adequate record on appeal and its attempt to abrogate this Court's ap-

pellate review, the transcripts of evidence should be ordered by this Court as they document the gross criminal misconduct by the trial court, continuing to this date.

27. That I have received *no orders whatsoever* from the trial court or clerk of the trial court pertaining to settlement of the statement or any matters related or ancillary thereto.

28. That the proposed statement on appeal filed timely by me (EXHIBIT "B") pursuant to this Court's order sets forth twenty-five (25) pages of grounds for appeal and facts and evidence relating to those grounds for appeal consistent with the appellate strictures of this Court set forth in *People v. Jenkins supra*. All the statements are true and correct and factual and the actual reporters transcripts will so document.

29. That I filed a written demand for a pre-sentencing report, probation report and probation hearing with the trial court on March 27, 1986, which demand the Court totally ignored and rebuffed when I was threatened with contempt and when it sentenced me on April 7, 1986, consciously preventing me from any arraignment at sentencing or from being heard *whatsoever*. I was chained and threatened with violence by the marshall and removed from the courtroom.

30. Pages 22, 23 of said proposed statement filed and served on this Court on October 20, 1986 (almost a year ago) shows the following facts (see Exhibit "B"):

* * * *

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

(Title Omitted in Printing)

ORDER DENYING APPLICATION FOR ORDER VACATING BRIEFING SCHEDULE. MOTION TO STRIKE SETTLED STATEMENT AND APPLICATION FOR WRIT

THE COURT *

Defendant's application for order vacating this court's briefing schedule, motion to strike the settled statement and application for writ having been filed and having been duly considered,

Said applications and motion are hereby denied.

The order fixing dates to file briefs in this matter is vacated and brief dates are re-set as follows:

Appellant's Brief—October 20, 1987

Respondent's Brief—November 9, 1987

Appellant's Reply Brief—November 19, 1987

/s/ Soven

/s/ Newman

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* Before Soven, Acting P.J., and Newman, J.

IN THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

(Title Omitted in Printing)

APPELLANT'S MOTION AND DEMAND FOR REPORTERS TRANSCRIPTS AT PUBLIC EXPENSE; DECLARATION OF EUGENE J. CARELLA; MEMORANDUM OF POINTS AND AUTHORITIES

Filed January 26, 1988

For Immediate Action

TO: JUDGES OF APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, CENTRAL DISTRICT

COMES NOW, EUGENE JOHN CARELLA, ESQ., Appellant herein, without waiver of disqualification to the Judges of the Appellate Department of the Superior Court of California, County of Los Angeles, Central District, and pursuant to the Rules of Court and the Supreme Court mandate of *In Re Armstrong*, 126 CA 3d 565, 178 CR 902 (1981), and moves this Court for an Order directing that the entire Transcripts of Proceedings in the false and criminally-inspired and orchestrated trial proceedings, the subject of this appeal, be prepared and provided to Appellant at public expense and concurrently filed with the Appellate Department of the Superior Court to be used in the adjudication of Appellant's appeal now pending before this Court.

In support of the subject motion, Appellant shows the Court the imperative and indisputable need to have

verbatim reporters' transcripts to document the gross criminal irregularities carried out against Appellant and the necessity to document a total failure and insufficiency of evidence by the People and reprehensible and gross prosecutorial and trial court prejudice, misconduct and fraud used to secure the false judgment and verdict now before this Court.

Appellant, in addition to making a prima facie showing for the need for said reporters' transcripts, also shows his Affidavit for Present Financial Indigency identified as *EXHIBIT "A-3"* and attached herewith and incorporated and made a part of his Declaration (EXHIBIT "A") documenting his incapacity to pay for said transcripts. That failure to accord Appellant a reporter's transcript and made a part of the Record on Appeal will result in irreparable injury to Appellant in the disposition of his appeal not yet submitted to this Court, and will grossly abridge his constitutional right to due process of law, as the certified "settled statement" prepared by the trial court is a fraudulent, misrepresentation of the proceedings and evidence adduced at trial; that the purpose and objective of this appellate court will also be served by the preparation and filing of the Reporters' Transcripts, as said transcripts set forth "fairly and accurately" the evidence and proceedings below and fully demonstrate a total abrogation of this Appellant's constitutional rights at time of trial, as is more completely demonstrated in the grounds for appeal.

Said motion is based upon all papers, pleadings, documents, and the like on file herein—together with the Declaration of Appellant, identified as *EXHIBIT "A"* and the Memorandum of Points and Authorities attached herewith.

DATED: January 22, 1988

By: /s/ Eugene John Carella
EUGENE JOHN CARELLA

EXHIBIT "A"

DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE J. CARELLA, declare and state as follows:

1. That I am the Appellant herein-defendant below.

2. That I am herewith and hereby specifically demanding that the Reporters' Transcript of Trial Proceedings, the subject of this appeal, be furnished to me and made a part of the Record on Appeal and filed with this Court forthwith.

3. That a true and correct copy of a Proposed Statement on Appeal and Notice to Prepare and Incorporate Reporters' Transcripts in Statement which was filed with the trial court on or about June 14, 1986 is identified as *EXHIBIT "A-1"* and attached herewith, consisting of nine (9) pages.

4. That these grounds for appeal have been certified by the trial court in the Statement on Appeal.

5. That a review of said Grounds for Appeal demonstrates twenty-four (24) separate grounds for appeal, several of which assert gross prosecutorial and trial court misconduct, fraud and prejudice which *can only be evidenced by verbatim reporters' transcripts.* (Grounds Nos. 7, 14, 15, 17, 18 and 22).

6. That Appellant further urges this Court to throw out the bogus and false judgment and conviction of the trial court on the grounds of a "complete insufficiency of evidence" and failure of proof by the People (Ground No. 10, 18, 21) and that the trial court failed to allow and admit important evidence to support Appellant's defense (Ground No. 20); and committed gross irregularities and errors of constitutional proportion regarding the giving of prejudicial jury instruction (Ground No. 6); and re-

fused to make other mandatory jury instructions required by her as a *matter of law* to protect Appellant's constitutional rights to a fair trial (Ground No. 5).

7. That the "settled statement" certified by the trial judge is gross and material misrepresentation of the evidence and proceedings occurring in the trial court, and is also lacking its requirement to set forth "concise factual summaries of each of the proceedings before the court from arraignment to judgment, including a recitation of the manner in which each of defendant's constitutional rights were protected." *See, People v. Jenkins*, 55 CA 3d, Supp. 55, 127, CR 870 (1976).

8. That I have been the victim of a common enterprise of criminal racketeering utilizing various state and federal courts throughout the United States to deprive me of my attorney fees, costs, and contingency fees earned by and owed to me, and to destroy my livelihood, person, and federal practice and reputation.

9. That the subject prosecution, the subject of this appeal, is but "one component" of this invidious criminal racketeering conspiracy orchestrated by state and federal officials.

10. That I am a distinguished legal advocate and recognized as such in *Who's Who in American Law* because of my contributions to the legal profession and that I was arguing a case in the United States District Court for the Central District of California on *June 18, 1985*—one (1) week before the false arrest.

11. That on or about January 20, 1988, a few days ago, I received word from the United States Supreme Court that my attempts to have the United States Court of Appeals for the Ninth Circuit to grant me attorneys fees in this matter earned and owed to me and represented to be paid to me (now exceeding $200,000) was rejected. (A copy of said Supreme Court Order is identified as *EXHIBIT "A-2"* and attached herewith.

12. That I had fully intended to receive these monies, inasmuch as the District Court for the Central District of California authorized an "attorney lien" to protect my *quantum meruit legal services* in a successful ERISA (Employee Retirement Income Act of 1974) litigation I conducted against General Electric Company, Inc., et al. on behalf of asbestosis-affected pension plan beneficiary who had been cheated out of all his disability and retirement benefits, but now enjoys a substantial settlement on account of my legal efforts and time expended on his behalf.

13. That I have expended well in excess of $200,000.00 of monies (pro bono out-of-pocket monies) and in excess of $1 million of billable time on behalf of said client's seeking redress in the federal court system.

14. That in view of the Supreme Court's denial on January 11, 1987 directing that my fees be paid to me, I am now at this time financially incapacitated and indigent, having exhausted all of my resources on behalf of client causes.

15. That the enclosed "Declaration of Financial Condition" in support of my demand for a Reporter's Transcript at public expense is a true and correct statement of my financial condition at this time and I am unable to pay for the Reporters' Transcripts which I have been advised by the Court Reporter would be between $5,000-$6,000.

16. That the Reporters' Transcripts of Proceedings are material and essential to adjudicate my appeal and will greatly assist the Court in its appellate decision-making and ensure the interest of justice.

17. That I further state that the subject trial proceedings before this Court were in furtherance of a criminal racketeering conspiracy authorized by the highest members of the Reagan Administration and done with the knowledge, consent and approval and affirmation of Ron-

ald Reagan personally, together with other high-ranking members of the Administration and carried out against me—including, but not limited to, Edwin Meese, William French Smith and William Webster.

18. That it is *impossible* for me to have a fair appeal, hearing or fair adjudication or fair trial without the preparation of the Reporters' Transcripts at public expense and I have made a *prima facie* showing for their need before this appeal is submitted to the Court for adjudication.

19. That the prospect for my financial condition to improve in the next six to twelve months is extremely marginal, as the conspiracy to deprive me of all my legal fees and earnings and bar practice has been further amplified and exacerbated by the subject malicious false proceedings.

20. That there is no plausible reason the People can advance to deny the motion, inasmuch as I have alleged a criminal "misuse of trial court proceedings" which Ira Reiner has a duty to investigate, and said trial transcripts demonstrate criminality in the conduct of the proceedings against me.

21. That I further specifically request that the Court direct Robert Morse, Court Reporter, to forthwith prepare the transcripts of trial proceedings set forth in Pages 8, 9 of EXHIBIT "A-1" attached herewith.

22. That I further request the oral argument on the appeal scheduled for January 28, 1988 be continued for a period of sixty (60) days to allow the Court to receive and review the transcripts referenced herein.

I declare that the foregoing is true and correct to the best of my knowledge and ability.

Executed on this 25th day of January 1988 in Los Angeles, California.

/s/ Eugene John Carella, Esq.
EUGENE JOHN CARELLA, ESQ.

EXHIBIT "A-3"

THIS FORM MUST BE KEPT CONFIDENTIAL

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 24001

Trial Court No. M 83675

Beverly Hills

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

EUGENE JOHN CARELLA,
Defendant and Appellant.

REQUEST FOR TRANSCRIPT AT PUBLIC
EXPENSE AND
DECLARATION OF FINANCIAL CONDITION

I request an order of this court directing preparation of Reporters' Transcripts at public expense in my [appeal to the Superior Court] No. 24001 filed on April 7, 1986.

In support of the foregoing request, I declare:

1. My full name is Eugene John Carella.

2. My address is P.O. Box 67292 Century City, Los Angeles, California 90067.

3. I am a person who does not have the money for Reporters' Transcripts without using money needed for the necessities of life and I do not have credit to borrow the needed sum.

My present income, assets and expenses are:

A. *OCCUPATION:* Attorney.

1. I *am not* presently employed.

a) My present employer is:

Whose address is:

b) If not employed now, my last period of employment was April 1984 to Sept. 1984.

c) Last employer's name Bretcourt Financial Planning, Inc.

Whose address was 1317 W. Foothill Blvd., Upland, California.

B. *MARTITAL STATUS:*

1. Married ☐ Single ☒ Other ☐

2. Spouse: Is employed ☐ Is not employed ☐

C. *EMPLOYMENT INCOME*

1. Current gross monthly employment income (including welfare, unemployment)

None.

2. Current monthly fixed deductions:

Witholding tax:

Federal Not applicable.

State Not applicable.

Social Security (FICA) Not applicable.

Unemployment Insurance Not applicable.

Medical Insurance Not applicable.

Dental Insurance Not applicable.

Union Dues Not applicable.

Retirement Contribution Not applicable.

Other payroll deductions (indicate for what purposes money is witheld) Not applicable.

TOTAL DEDUCTIONS Not applicable.

NET MONTHLY EMPLYOMENT INCOME

None.

D. *INCOME OTHER THAN EMPLOYMENT INCOME*

Any other income: (List all sources of income here, other than wages, including aid for dependent children; Social Security; rents; dividends; interest; pensions; trusts; or money from any source:)

1. None.

E. *ASSETS*

Savings Accounts None.

Checking Accounts None.

Credit Union(s) None.

Bonds and Stocks None.

Home (market value) None.

Home loan balance NET: None

Other real estate (market value) None.

Loan balance NET: None

Furniture

Vehicles (net value after deducting loan balances)

Auto(s) None.

Truck(s) None.

Motorcycle(s) None.

Other property (boats, etc.) None.

Retirement fund—vested interest None.

TOTAL ASSETS None.

F. *EXPENSES*

My monthly living expenses are paid mainly from the money I receive from—(List source of money used to pay expenses—wages, welfare, etc.) Money borrowed from friend.

Rent or mortgage N/A.

Food 100/mo.

Clothes 10/mo.

Transportation 20/mo.

Utilities N/A.

Medical N/A.

Dental 20/mo.

Child care N/A.

Other (List) N/A.

150/mo.

INSTALLEMENT PAYMENTS

Creditor	*Monthly Payment*
N/A.	N/A.

TOTAL MONTHLY EXPENSES 150/mo.

4. The names and ages of my dependents are:

Name	*Age*
None.	

5. Crime which I was convicted of: Theft of rental Nature: automobile. furnished to me pursuant to rental contract.

6. Name and address of attorney who represented me at the trial was: N/A.

7. Describe briefly what attempts you have made to find a lawyer to handle this appeal for you, and why you cannot get your own lawyer. N/A.

I declare under penalty of perjury that the foregoing is true; and that this declaration was executed on January 25, 1988, at Los Angeles, California.

/s/ Eugene John Carella
EUGENE JOHN CARELLA

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Superior Ct. No.CRA24001

Municipal Court of the
Beverly Hills Judicial District

No. M83675

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

EUGENE JOHN CARELLA,
Defendant and Appellant.

MEMORANDUM JUDGMENT

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is affirmed.

Defendant contends that the trial court erred in instructing the jury concerning the presumptions contained in Penal Code section 484 subdivision (b) and Vehicle Code section 10855. We do not agree. Both presumptions are presumptions affecting the burden of producing evidence. (See *People v. Hemmer* (1971) 19 Cal.App.3d

1052, 1060-1062.) The effect of such presumptions, under Evidence Code section 604, is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence. (See *People v. Hedrick* (1980) 105 Cal.App.3d 166, 170.) Here, unlike the defendants in *Hemmer* and *Hedrick*, defendant never offered testimony concerning the nonexistence of the presumed facts stated in Penal Code section 484 subdivision (b) and Vehicle Code section 10855. We find no error.

Defendant next contends that the trial court erred by not giving an instruction concerning a good faith belief or mistake of law or fact. However, defendant offered no evidence to support the giving of such instructions. Again, there was no error. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 138.)

Next, the court docket directly contradicts defendant's contention that he did not waive time on July 1, 1985. Thus, the record shows there was no violation of defendant's speedy trial rights.

Defendant contends that the court was required to stay judgment and sentencing pending defendant's appeal. The record, however, shows that the trial court set bail for defendant pending his appeal. Such was all that was required. (Pen. Code, § 1272(2).)

Defendant next claims that the trial court erred by not obtaining a pre-sentencing probation report before sentencing defendant. The trial court had no mandatory duty to do so. (Pen. Code, § 1203(d).)

Our review of the record convinces us that substantial evidence supports defendant's conviction. (*People v. Johnson* (1980) 26 Cal.3d 557, 562.)

We need not address defendant's remaining contention. (Cal. Rules of Court, rule 105(c); see *People v. Merriam*

(1967) 66 Cal.2d 390, 397.) We observe, however, in our review, no evidence to support appellant's contention.

/s/ Margolis
Presiding Judge

We concu[illegible]

/s/ [Illegible]
Judge

/s/ Woods
Judge

Filed February 3, 1988

IN THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Appeal No. CRA 24001

LAMC M 83675

EUGENE JOHN CARELLA,
Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

APPELLANT'S PETITION FOR REHEARING AND APPLICATION FOR TRANSFER; DECLARATION OF EUGENE JOHN CARELLA; DECLARATION OF PAULA PFISTER; MEMORANDUM OF POINTS AND AUTHORITIES

Filed February 18, 1988

TO: JUDGES OF APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, CENTRAL DISTRICT [WITHOUT WAIVER OF DISQUALIFICATION TO JUDGES NEWMAN, MARGOLIS, WOODS, ROBERTSON]

COMES NOW EUGENE JOHN CARELLA, ESQ., Appellant herein, without waiver of disqualification to Judges of Appellate Department of Superior Court of

California, County of Los Angeles, Central District, as constituted, pursuant to the Rules of Court and the Supreme Court mandate in *In Re Armstrong*, 126 CA 3d 565, 178 CR 902 (1981), and moves this Court for an Order of Rehearing and Reconsideration of the Memorandum Judgment of February 3, 1988 and further order that a complete Transcript of Proceedings in the void and criminally-inspired and orchestrated trial proceedings, the subject of this appeal, be prepared and provided to Appellant at public expense and concurrently filed with the Appellate Department of the Superior Court to be used in the adjudication of Appellant's appeal now pending before this Court.

In support of the subject petition of rehearing and reconsideration, Appellant shows this Court the Declaration of Eugene J. Carella, Esq. and Paula Pfister, demonstrating *prima facie* the fraud committed by the trial court and People in the preparation of the trial evidence as reflected in the Certified Settled Statement settled by the trial court who was disqualified; the egregious abrogation of Appellant's constitutional due process and equal protection rights to have a complete transcript of trial evidence prepared at public expense and filed as part of the record to document his twenty-four (24) grounds on appeal; and a gross misapplication and misapprehension of facts and law by the Appellate Department, the members of which are the subject of vigorous disqualification foreclosing further action and invalidating prior action who have in common enterprise with the trial judge excised and obstructed material evidence from Appellant's record on appeal, all of which summate to deny Appellant-Petitioner herein a fair trial, and constitutionally sufficient adjudication on appeal. Appellant prays his Petition for Rehearing be granted and that the Appellate Department's judgment of February 3, 1988 affirming the judgment of the trial court be promptly vacated by a panel of this Court free from bias and

prejudice against Petitioner and that the judgment of conviction be vacated post haste because of gross, irreparable and infirming injury and fraud carried out against Appellant, denying Appellant's fundamental right to due process and equal protection of law and a fair trial and fair adjudication on appeal.

Said petition is based on all papers, pleadings, declarations, and the like on file here—together with memoranda of points and authorities and said further and additional evidence as may be adduced.

DATED: February 17, 1988

By: /s/ Eugene John Carella, Esq.
EUGENE JOHN CARELLA, ESQ.
Appellant

EXHIBIT "A"

DECLARATION OF PAULA E. PFISTER

I, PAULA E. PFISTER, declare and state as follows:

1. That I reviewed the testimony alleged to have been furnished by me at the time of trial of Eugene J. Carella as represented in the Certified Settled Statement.

2. That the testimony I actually rendered at the trial has been significantly and substantially *altered* and the statements ascribed to me in the settled statement are not true and correct and are known to be inaccurate by the trial judge and District Attorney.

3. That at the time of trial I testified that I was physically with Mr. Carella on the late afternoon of May 11, 1985 when Mr. Carella physically visited the rental offices of MPG Car Rental at the intersection of Doheny and Wilshire Boulevard.

4. That I further testified that it was my knowledge that Mr. Carella had substantial monies with him when he went to the MPG Car Rental office and did for the purpose of making further and additional payment on his account.

5. That I further testified that MPG Car Rental Office and the Union 76 Service Station physically adjoin one with another and that Mr. Carella after not being able to locate anyone at MPG inquired at the Union 76 station if they knew where the MPG personnel were or if they could accept payment for them.

6. That I also testified that Mr. Carella also secured gas from the Union 76 at Doheny/Wilshire adjoining the MPG office after he could not find anyone and secured *a receipt signed and stamped May 11, 1985, which receipt would not be permitted to be entered as evidence at the time of trial.*

7. That I further testified that Mr. Carella was physically present and in Los Angeles and at the Century Wilshire Apartment location where he resided for a period of approximately two (2) years at all material times and for each and every night in 1984 and 1985, excepting a weekend visit to Palm Springs, and lived in the Los Angeles area and was prosecuting legal matters in the state and federal court located in Downtown Los Angeles regularly and had made various appearances in these courts during this time in question.

8. That I further state that while on the witness stand Mr. Carella showed me a copy of the receipt he received from the Union 76 service station dated May 11, 1985 which he sought to have me authenticate and sought to introduce the receipt into evidence, but the court would not let him.

9. That I further state that I personally accompanied Mr. Carella on June 20, 1985 (*one week before the false arrest*) to the law offices of Roper & Folino located at 3255 Wilshire Boulevard and attended a conference scheduled by Charles Woodmansee, a court-appointed referee (Jack Newman involuntarily appointed him), in litigation in which Mr. Carella and I were both plaintiffs, e.g., *Eugene J. Carella, Esq., Paula Pfister v. Sheraton Corporation*, LASC No. 516 399, where Mr. Carella and myself are suing for Unruh Civil Rights violations and false imprisonment, assault and batter charges and numerous other claims for damages and injunctive relief.

10. That I further state that I had personal knowledge that Mr. Carella also during the week of June 20, 1985, a few days before the false arrest, physically visited and met with Roscoe Jones, Director of the Federal EEOC (Equal Employment Opportunity Commission) in Los Angeles, located at 3255 Wilshire Boulevard, the same location of Roper & Folino, and filed a housing and employment discrimination charge with that office still pending with that Federal commission.

11. That I further state that I know that Mr. Carella on June 18, 1985 just nine (9) days before the subject false arrest was in the U.S. District Court for the Central District of California seeking to be heard on the question of $140.000 of attorney fees owed to him in litigation commenced against General Electric, Inc. and his attorney lien granted him by the district judge. This Court is located at 312 N. Spring Street, Los Angeles, California.

12. That Judge Judith Stein prevented Mr. Carella from introducing evidence of any of these proceedings and/or to take mandatory judicial notice of them, even though Mr. Carella diligently sought to have such evidence introduced at the time of trial on March 17, 1986, and thereafter.

12. That I have specifically reviewed the settled statement certified by Judith Stein on August 17, 1987, and, in particular, the summary of my testimony. The testimony assigned to me is distorted and altered substantially, to wit: 1) I testified I traveled with Mr. Carella to MPG Rental office on the late afternoon of May 11, 1985, not the *evening*; 2) the statement that she knew that appellant had a large amount of cash on him at the time (May 11, 1985) is true, but the following statement . . . "*she did not know what he was going to do with the money*" is an outright lie and falsehood, and known to be such.

13. That I further specifically state that while on the witness chair I was harassed, intimidated and threatened by the trial judge Judith Stein and that she had also violated my rights when I was absent from the courtroom by having my person and purse searched over my protestation and when there was no reason for this conduct.

14. That I further state that the subject rental vehicle was put in a Century Wilshire parking space which was accessible to inspection each and every night in question,

located at 10776 Wilshire Boulevard—a little more than a mile from the MPG Rental offices.

15. That I further state that I was percipient to Mr. Carella's false arrest at the Century Wilshire Apartments in the early morning of June 27, 1985 when I heard Mr. Carella inform Detective Schwab that he had spoken to Jennifer Ayres of the Beverly Hills Police Department who advised him "that 'Schwab' was on an extended vacation."

16. That I am aware that Mr. Carella had gone to the Beverly Hills Municipal Court to see the court reporter Robert Marsh (September 1985) on the transcripts when he was ordered arrested again by Judith Stein to prevent him from obtaining the subject transcripts and documenting his appeal.

17. That I had filed a complaint with the Police Department of Inglewood and the District Attorney's office *just prior to the false arrest of Mr. Carella on the grand theft and conversion of all my property, files and possessions acquired over a twenty (20)+-year period and monies taken under false pretenses for the safekeeping of this property.* Mr. Carella's property, files and possessions and monies were also with this property that was converted/thefted.

18. That the Police Department and District Attorney's office refused to do anything about this matter, and shortly thereafter caused the false arrest of Mr. Carella for the same charges I lodged with them on the theft/conversion of our property.

The foregoing statements are true and correct to the best of my knowledge and ability.

Executed on this 17th day of February 1988 in Los Anageles, California, under penalty of perjury.

/s/ Paula Pfister
PAULA PFISTER

EXHIBIT "B"

DECLARATION OF EUGENE J. CARELLA, ESQ.

I, EUGENE J. CARELLA, ESQ., declare and state as follows:

1. That I am the appellant-petitioner herein.

2. That the foregoing declaration is made in support of my petition for rehearing and application for transfer to the Court of Appeals made alternatively on said petition.

3. That the subject rehearing petition is filed pursuant to Rule 107 of the Rules of Court.

4. That I further state the judgment of the Appellate Department is so grossly infected with constitutional infirmities, as is the trial judgment, that I am seeking and fully intend to seek appropriate intervention by the Court of Appeal and/or State Supreme Court and/or United States Supreme Court to have the subject fraudulent judgment vacated and thrown out because my constitutional rights to a fair trial and for hearing have been irreparably and irrevocably violated.

5. That I am accordingly requesting that this Court stay the issuance of remittitur consistent with Rule 144 (c) of the Rules of Court should it not be disposed to grant the instant petition for rehearing to enable me sufficient time to have the constitutional injuries and infirmities complained of reviewed and redressed by a higher court.

6. That I specifically incorporate the declaration of Paula E. Pfister identified as *EXHIBIT "A"* and attached herewith as being recited in support of this declaration.

7. That the Appellate Department decision, the subject of the petition for rehearing, is grossly defective and constitutionally infirmed for the following reasons:

(a) It was rendered by Appellate Department judges who are disqualified and the subject of a disqualification for cause petition, requiring all orders, judgments and the like of said Appellate Department be vacated;

(b) It is infirmed because Appellant, who is financially indigent, has been deprived of his fundamental constitutional right to a Reporters Transcript of Trial Evidence furnished him and made a part of the Record on Appeal to document his twenty-four (24) grounds for appeal. (*In Re Armstrong*, 126 CA 3d 565, 128 CR 902 (1981);

(c) The settled statement certified by the trial court is a fraud, sham, nullity and not drawn in conformity with the Rules of Court or mandates of the Supreme Court of the State. (*See, People v. Jenkins*), and should be stricken.

(d) The memorandum judgment willfully mistates evidence and falsely indicates a waiver by Appellant of his constitutional right to a speedy trial which is in direct contradiction to what actually occurred at the pre-trial proceedings;

(e) The memorandum judgment consciously and willfully fails and refuses to consider and address each of the grounds for appeal set forth in the certified settled statement, each of which requires that the trial court judgment be vacated and thrown out as a matter of law;

(f) That the judgment misapprehends the law with respect to mandatory jury instructions and sua sponte instruction required to be made by the trial judge and further ignores the notice and demand requirements mandated by due process consideration before jury instructions on the presumption of Sections 484 and 10855 of the Penal Code and Vehicle Code can be given;

(g) The combination of the Appellate Department's conscious refusal to order the complete Reporters' Transcripts of Trial Evidence, at the same time it seeks to

conclude that *no evidence exists to document Appellant's grounds of appeal* constitutes an actionable fraud on Appellant and taints the judgment.

8. That I specifically state that in January 1986 *prior* to the start of the actual trial proceedings, in open court before visiting Judge Morse I had the Court Reporter Douglas Weaver read his notes for the actual proceedings that occurred before Commissioner Murphy on June 27, 1985 and July 1, 1985. At that time, in open court, Mr. Weaver specifically stated that his notes for the subject days stated showed that Appellant "did *NOT* waive his right to a speedy trial" in response to the Commissioner's direct questions of waiver.

9. That the court docket in this regard is obviously false, incorrect, and was to have been corrected by Robert Tauger, Clerk in Division 5, who was aware of the incorrect docket entry showing a 'waiver.'

10. The Appellate Department judgment is therefore infirmed because it is based on false and mistaken facts and the Reporters Transcripts will so verify.

11. That the Appellate Department judgment also failed to specifically address the gross error committed by the trial court by refusing to grant Appellant a presentencing probation hearing, at the same time it immediately sentenced Appellant and refused to stay the sentencing and judgment pending his appeal in derogation of the laws of this State.

12. That I further state the Reporters Transcripts of Trial Proceedings demanded by me to be made a part of the Record demonstrate *prima facie* the validity of the twenty-four (24) grounds for appeal recited by me in my Proposed Settled Statement and command the judgment, the subject of this petition, and the underlying trial court judgment, be forthwith vacated. Accordingly,

I specifically demand that the Reporters Transcripts be prepared and filed with this Court at public expense.

13. That two (2) salient grounds for appeal conspicuously not addressed and omitted by the Appellate Department are the disqualification of the trial court moved by Appellant as reflected on the *docket sheet* which renders null and void all orders of the trial judge, and the gross acts of prosecutorial misconduct ranging from disparaging references of Appellant to the use of diagrams, charts and documents not authenticated or moved in evidence during the course of the trial.

14. That I advised the Appellate Department as far back as *October 1986* that the trial judge, who is disqualified, had consciously interfered with and obstructed my rights to secure the Reporters Transcripts by having me falsely arrested after I was ordered by the Appellate Department to secure from the Court Reporter Marsh information concerning said Reporters Transcripts.

15. That my right to secure the subject transcripts at public expense is a fundamental constitutional due process right which is essential to ensure me a fair trial and fair appellate adjudication of my rights on appeal.

16. That Judges Newman, Margolis, Robertson and Woods are disqualified from acting in these proceedings and I specifically demand a successor Appellate Department appointed in accordance with law be convened to adjudicate my appeal and all the grounds asserted therein on the basis of a complete and true record on appeal, including the Reporters Transcripts of Trial Proceedings and that they be preempted from acting further herein.

17. That I specifically incorporate my Motion and Demand for Reporters Transcripts at Public Expense, together with Exhibits filed with the Appellate Department on January 26, 1988 into the within declaration.

I declare that the foregoing is true and correct to the best of my knowledge and ability.

Executed on this 17th day of February 1988 in Los Angeles, California, under penalty of perjury.

/s/ Eugene John Carella
EUGENE JOHN CARELLA, ESQ.

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Superior Ct. No. CR A24001

Municipal Court of the Beverly Hills Judicial District

No. M 83675

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

EUGENE JOHN CARELLA,
Defendant and Appellant.

ORDER DENYING DEFENDANT'S PETITION FOR REHEARING AND APPLICATION FOR TRANSFER

Filed February 24, 1988

THE COURT*

The above petition and application having been made, submitted and duly considered,

Said petition and application are denied.

IT IS FURTHER ORDERED that all other demands included in the above petition and application are denied.

/s/ Margolis
/s/ Roberson
/s/ Woods

---

* Before Margolis, P.J., Roberson, J., and Woods, J.

SUPREME COURT OF THE UNITED STATES

No. 87-6997

EUGENE JOHN CARELLA,
Appellant,

v.

CALIFORNIA

APPEAL from the Appellate Department, Superior Court of California, Los Angeles County. The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

November 7, 1988

SUPREME COURT OF THE UNITED STATES

No. 87-6997

EUGENE JOHN CARELLA,
Appellant,

v.

CALIFORNIA

The order entered November 7, 1988 is amended to read as follows:

"The motion of appellant for leave to proceed *in forma pauperis* is granted. In this case probable jurisdiction is noted limited to Questions I, II, III, IV, V, and VII presented by the jurisdictional statement."

November 28, 1988

SUPREME COURT OF THE UNITED STATES

No. 87-6997

EUGENE JOHN CARELLA,
Appellant,

v.

CALIFORNIA

ON CONSIDERATION of the motion for appointment of counsel,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted and it is ordered that Christopher D. Cerf, Esquire, of Washington, D.C., is appointed to serve as counsel for the appellant in this case.

December 12, 1988

Justice Brennan took no part in the consideration or decision of this motion.

(8)

Supreme Court, U.S.
FILED
MAR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-6997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE JOHN CARELLA,

Appellant,

v.

STATE OF CALIFORNIA,

Appellee.

On Appeal From The Appellate Department Of The Superior Court of California, County of Los Angeles

---

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

1. Whether appellant was denied due process of law by a jury instruction, given pursuant to California Vehicle Code § 10855, that an individual who fails to return a rental car within five days after the rental agreement has expired "shall be presumed to have embezzled the vehicle."

2. Whether appellant was denied due process of law by a jury instruction, given pursuant to California Penal Code § 484(b), that "intent to commit theft by fraud is presumed" if a lessee fails to return leased property within 20 days of demand.

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OPINIONS BELOW

The opinion of the Appellate Department of the Superior Court State of California, County of Los Angeles is unreported and is reprinted in the Joint Appendix (JA) at 60. The order denying appellant's petition for rehearing and application for transfer, also unpublished, is reprinted at JA 75.

JURISDICTION

The judgment of the Appellate Department of the Superior Court State of California, County of Los Angeles was entered on February 3, 1988. The petition for rehearing and application for transfer to the Court of Appeals of California were denied on February 24, 1988, thus rendering the Appellate Department the highest court in the State for purposes of this appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (repealed). This Court noted probable jurisdiction on November 7, 1988. By an amending order issued on November 17, 1988, the Court limited review to Questions I, II, III, IV, V, and VII of Appellant's Jurisdictional Statement.

STATUTES INVOLVED

This case involves the validity under the Due Process Clause of two California statutes. Cal. Vehicle Code § 10855 provides as follows:

> Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

Cal. Penal Code § 484(b) provides as follows:

> Except as provided in Section 10855 of the Vehicle Code, intent to commit theft by fraud is presumed if

> one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

The United States Constitution, Fourteenth Amendment, Section 1, provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Appellant was convicted of grand theft for failing to return a rented car by the date set out in the rental agreement. The question presented is whether two California statutes, pursuant to which the jury was instructed to presume commission of the offense from the prosecution's proof of certain predicate facts, denied appellant due process of law.

1. Under California law, the illegal appropriation of an automobile can give rise to one of several distinct offenses. Vehicle Code § 10851 provides that any non-consensual taking of a vehicle is a "public offense" if undertaken with a specific "intent either to permanently or temporarily" deprive the owner of title or possession. Alternatively, the taking of a vehicle can constitute "grand theft" in violation of Penal Code §§ 484(a) & 487(3).[1] For present purposes, the principal distinction between a violation of Cal. Vehicle Code § 10851 and grand theft auto lies in the element of intent. Whereas the former authorizes conviction even if

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[1] Section 484 defines the crime of theft generally. Penal Code § 486 provides that theft can be either "petty" or "grand." Theft of an automobile is automatically characterized as grand. Penal Code § 487(3).

the defendant intended only a temporary deprivation, the latter has long been interpreted to require a specific intent to "deprive the owner of the automobile permanently." *People* v. *Pater*, 267 Cal. App. 2d 921, 73 Cal. Rptr. 823, 825 (3d Dist. 1969).[2]

In cases involving the illegal retention of a rented automobile, California prosecutors are given the benefit of two statutory presumptions. Vehicle Code § 10855 provides that whenever a person has "willfully and intentionally" failed to return a rental vehicle within five days after the expiration of the rental agreement, "that person shall be presumed to have embezzled the vehicle." Although housed in the Vehicle Code, Section 10855 bears on the crime of "embezzlement," a species of grand theft.[3] Thus, proof of the predicate fact—intentional failure to return a car within five days of a rental agreement's expiration—generates a presumption with respect to *all* of the constituent elements of the offense. In contrast, the presumption set out in Penal Code § 484(b) bears only on the element of intent.[4] Under its terms, "intent to commit

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[2] This distinction is enshrined in the pattern jury instruction for both offenses. *See*, CALJLIC 14.37 (1972 Revision). Those instructions were read to Appellant's jury. JA 8.

[3] *See, e.g.*, *People* v. *Starkey*, 234 Cal. App. 2d 822, 44 Cal. Rptr. 738, 742 (2d Dist. 1965). As in many states, the generic crime of "theft" in California is a relatively recent legislative development intended to supplant and incorporate the pre-existing offenses of larceny, larceny by fraud or trick, and embezzlement. *See People* v. *Eitzen*, 43 Cal. App. 3d 253, 262, 117 Cal. Rptr. 772, 777 (1st Dist. 1974). The trial court in the present case specifically instructed the jury that embezzlement was a form of theft. JA 10.

[4] The relationship between Penal Code § 484(b) and Vehicle Code § 10855 is far from clear on the face of the statutes. Penal Code § 484(b) begins with the phrase "[e]xcept as provided in Section 10855

theft by fraud is presumed" when the lessee of personal property fails to return it within 20 days after the lessor makes a written demand by certified or registered mail. The demand must be made within 30 days of the expiration of the lease and is deemed "proper" if sent to the address provided by the lessee as well as "any other known address." Penal Code § 484(e).

If implemented as intended, both statutory presumptions operate to shift the burden of production to the defendant upon the State's proof of the predicate facts. Penal Code § 484(d); *People* v. *Hemmer*, *supra*, 19 Cal. App. 3d at 1061, 97 Cal. Rptr. at 521-22. A separate provision of California law provides that "[t]he effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its non-existence." Cal. Evidence Code § 604.

2. On June 25, 1985, appellant was charged by criminal complaint with grand theft (Penal Code § 487(3)) and a violation of Vehicle Code § 10851. JA 3-4. The charges arose out of appellant's failure to return a rented car within the time specified in the rental agreement.

The State's evidence at trial showed that appellant had rented an automobile from the MPG Rental Company on

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of the Vehicle Code." Because § 484(b) covers leased property generally, while § 10855 is limited exclusively to rental vehicles, the legislature may well have intended that only the latter, more specific provision apply in cases involving vehicles. Whatever the intent, however, California juries in rental vehicle cases are typically instructed on both presumptions. *See, e.g.*, *People* v. *Hemmer*, 19 Cal. App. 3d 1052, 97 Cal. Rptr. 516 (4th Dist. 1971). Consistent with that apparent trend, the trial court in the instant case included both statutory presumptions in its charge to the jury. JA 15.

March 25, 1985, but had exchanged it the following day. At the time of the exchange, he left a $400.00 deposit and signed a standard rental agreement pursuant to which he agreed to return the vehicle on or before April 26, 1985. JA 36-38. Prior to the expiration date, appellant telephoned MPG and was given permission to extend the agreement until May 3, 1985. When the car was not returned by that date, the owner of MPG made a number of efforts to contact appellant. Having failed to reach him by telephone, the owner sent a registered demand letter to each of the two addresses provided by appellant at the time of the initial rental.[5] JA 37. When these too elicited no response, the owner reported the car as stolen. Appellant was arrested on June 27, 1985. The automobile was recovered the same day in the parking lot adjoining appellant's business address. *Id.*

Appellant represented himself at trial. In addition to cross examining all of the State's witnesses, he offered the testimony of Jennifer Ayres, a cadet at the Beverly Hills Police Department, and Paula Pfister, his fiancee. Ms. Ayres testified that she was on duty on June 3, 1985, but was unable to corroborate appellant's assertion that he had telephoned that evening to talk to the detective who had been inquiring about the status of the rental car.[6]

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[5] The letter sent to appellant's residence was returned marked "[m]oved with no forwarding address." Although the second letter was not returned, the State offered no direct evidence to confirm that appellant had in fact received it. *See generally* JA 37.

[6] The "Settled Statement on Appeal" states that Ms. Ayres testified that she "had no memory of whether Appellant telephoned Detective Schwab." JA 38. Appellant attempted to put this testimony in context in his appellate brief below. His purpose in pursuing this line of questioning was to demonstrate that his conduct was inconsistent with an intent to deprive the owner of the car permanently. Appellant's Brief 13-14.

The precise content of Ms. Pfister's testimony remains the subject of some dispute. In an affidavit filed in the appellate court below, she described her prior testimony as follows: On May 11, 1985 she accompanied appellant to the offices of MPG Car Rental. At the time he "had substantial monies with him . . . for the purpose of making further and additional payments on his account." Upon discovering that no one was in the office, appellant stopped at an adjoining gas station to inquire if anyone there could accept payment. When he learned that no one could do so, he purchased gasoline and departed. JA 66.[7] In contrast, the "Settled Statement on Appeal"—which was prepared unilaterally by the prosecution and adopted without change by the trial court—describes her testimony in somewhat different terms.[8] According to that

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[7] Ms. Pfister's declaration was filed with appellant's Petition for Rehearing, part of the judgment noticed in appellant's appeal to this Court.

[8] The content of the appellate record in this case was the subject of protracted litigation below. Under California law, an appellant in a criminal matter is entitled to a record of "sufficient completeness to permit appellate scrutiny." *People* v. *Jenkins*, 55 Cal. App. 3d Supp. 55, 61, 127 Cal. Rptr. 870, 873 (Cal. App. Dep't Super. Ct. 1976), (citing *Coppege* v. *United States*, 369 U.S. 438 (1962)). An appellant "may choose to rely on a transcript" rather than an agreed statement of facts and, if indigent, is entitled to free transcription where "such record is essential to the appeal." 55 Cal. App. 3d Supp at 62, 127 Cal. Rptr. at 874. *See generally* California Rule of Court 183 *et seq.* Appellant gave notice of his intention to proceed by transcript, but did not succeed in making the necessary arrangements, in part, he contends, because he was arrested for contempt when he was attempting to do so. JA 42. At the direction of the Appellate Department, the trial court then set a schedule pursuant to which the parties would meet in open court to work out a "settled statement on appeal." Appellant failed to attend the scheduled hearing, later claiming that he had not been given notice of it. JA 45. Notwithstanding

document, she testified that on Saturday May 11, 1985 she accompanied appellant to a gas station near the MPG offices. At the time, she knew that Appellant had "a large amount of cash with him," but "did not know what he was going to do with the money." JA 38.

At the close of appellant's evidence, the court instructed the jury on the elements of the two offenses charged in the complaint. In particular, the jury was instructed: that all forms of theft require a specific intent to deprive the rightful owner of property permanently; that embezzlement is a form of theft; that conviction under Vehicle Code § 10851 would be authorized upon proof of an intent to deprive the owner of temporary possession; and that the defendant could not be convicted of both offenses. JA 6-10.

In addition, at the State's request—and over appellant's objection—the court charged the jury with the presumptions set out in Vehicle Code § 10855 and Penal Code § 484(b).[9] With respect to the former, the jury was told that a "[w]henever any person . . . willfully and intentionally fails to return" a rented vehicle within five days of the expiration of the rental agreement, "that person shall be presumed to have embezzled" it. JA 15. With respect to the latter, the jury was instructed that "[i]ntent to commit theft by fraud is presumed" if one who rents the personal

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appellant's absence, the trial court accepted verbatim the prosecution's written statement of facts and "certified" it as the record on appeal. Appendix of Motion of Appellee to Dismiss at App. 13. Appellant's motion to strike the settled statement was denied JA 48.

[9] It is undisputed that the instructions were intended as applications of Vehicle Code § 10855 and Penal Code § 484(b). The State cited the two statutory provisions when it submitted the proposed instructions to the trial court, and the instructions closely track the language of the statutes.

property of another fails to return it within 20 days of written demand by registered mail. *Id.* Beyond these explicit directions, the jury was given no further guidance on how the presumptions were intended to operate.

After a period of deliberation, the jury returned to the courtroom to ask for further clarification on the presumptions. A handwritten note signed by the foreman posed the following questions:

> In Count I [grand theft], does the presumption of 'intent,' as stated by the Court, include the legal requirement of '*permanent* deprivation of possession'? Is it considered permanent if he keeps the car over five days of the contract date? Or 30 days?

JA 23 (emphasis in original). The court responded by rereading the relevant portions of the original instructions, and the jury again retired.[10] After only nine minutes of additional deliberation, the jury found appellant guilty of grand theft. The court sentenced him to three years formal probation, the terms of which included six months in county jail and payment of restitution.

Appellant filed a timely appeal, contending that both of the statutory presumptions on which the jury had been instructed contravened the Fourteenth Amendment to the Federal Constitution. At the same time, he began a series of fruitless efforts to obtain the trial transcript.[11]

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[10] The docket sheet indicates that the jury "return[ed] to court for questions," and that "partial" instructions were read in response. Because the trial transcript is unavailable, *see infra* n. 11, there is no more precise indication of the details of the court's response.

[11] *See supra* n.8. The transcript is now unavailable. On inquiry from the Clerk's Office of this Court, it was discovered that the reporter who recorded the proceedings has since been dismissed and later moved without leaving a forwarding address.

These efforts culminated in a motion to the Appellate Department in which he declared his indigency and contended that the transcript was essential to his ability to prosecute an effective appeal. JA 49-50. The motion was denied by order on January 29, 1988.

On February 3, the Appellate Department issued a memorandum opinion affirming the judgment of the trial court in all respects. In its brief, the State had conceded that—regardless of the underlying intent of the statutory presumptions—the instructions premised on them had "erroneously" directed a conclusive presumption on an element of the offense. Brief of Respondent at 5, cited in Motion to Dismiss at 10 n.11. Disregarding that concession, the court held that the challenged presumptions "require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence." JA 61. Because appellant "never offered testimony concerning the nonexistence of the presumed facts," the court concluded, the presumptions were not infirm. *Id.*[12]

Appellant moved for rehearing and for leave to transfer the case for further appellate review. The motion renewed the request for the transcript, both as an independent claim and as a basis for granting reconsideration of the February 3, 1988 memorandum opinion. The motion was denied on February 24, 1988. Appellant appealed from both orders, and this Court noted probable jurisdiction limited to six questions pertaining to the constitutional validity of Penal Code § 484(b) and Vehicle Code § 10855.

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[12] Although it did not cite the Federal Constitution directly, the opinion distinguished two prior California cases in which the presumptions had been held unconstitutional under the Fourteenth Amendment. JA 62.

SUMMARY OF ARGUMENT

1. The Due Process Clause guarantees that a criminal defendant may not be deprived of liberty unless the prosecution proves every element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). As appellee conceded in the court below and again in its Motion to Dismiss, the trial court's instructions, given pursuant to Penal Code § 484(b) and Vehicle Code § 10855, violated this "bedrock" constitutional principle. *Id.* at 363. By directing the jury to presume "embezzlement" and the constituent element of specific intent from proof of certain predicate facts, the prosecution was able to secure a conviction without proving its case. Instructions that could be "reasonably . . . understood" as directing such conclusive presumptions are patently unconstitutional—whether or not the intended operation of the presumption was merely to shift the burden of production. *Francis* v. *Franklin*, 471 U.S. 307, 315 (1985); *Sandstrom* v. *Montana*, 442 U.S. 510, 515-17, 521-23 (1979).

Although appellee's concession is sufficient to dispose of the case, the challenged provisions are no less infirm even if the pertinent question were the constitutionality *per se* of presumptions that shift the burden of production to the defendant on an element of the offense. By directing the jury to find an element unless the defendant offers some quantum of evidence in rebuttal, such presumptions are generally invalid for the same reason as those that shift the burden of persuasion: they permit a conviction even if the prosecution failed to prove its case beyond a reasonable doubt. *See Francis* v. *Franklin*, *supra*, 471 U.S. at 317. Given the relative ease with which a burden of production can be satisfied, it may well be permissible to require a defendant to go forward with evidence pertain-

ing to such mitigating considerations as "heat of passion" or self defense—whether or not formally denominated an affirmative defense under the applicable state scheme. But where, as here, a presumption shifts the burden of production on the core elements of specific intent and the *actus reus* itself, it compromises the *Winship* right substantially, without serving any legitimate purpose at all.

Moreover, the presumption set out in Vehicle Code § 10855 is unconstitutional for a second reason as well. Even when a presumption operates to shift the burden of going forward, due process requires a "rational connection" between the predicate and presumed facts. *Tot* v. *United States*, 319 U.S. 463, 467 (1943). Because it cannot be said with "substantial assurance" that the willful retention of a rental vehicle five days beyond the scheduled return date implies a specific intent to keep it *permanently*, Vehicle Code § 10855 is invalid on its face. *Leary* v. *United States*, 395 U.S. 6, 36 (1969).

2. Appellee's contention that the constitutional error was harmless under *Chapman* v. *California*, 386 U.S. 18 (1967), is untenable. Unlike mandatory rebuttable presumptions, *see Rose* v. *Clark*, 478 U.S. 570 (1986), an instruction that directs a conclusive presumption on an element of the offense can never be harmless. In any event, even if the violation in this case were appropriate for harmless-error review, the result would be the same. Although the issue was not addressed by the court below, the record demonstrates, *first*, that the evidence of a specific intent to keep the car permanently was inconclusive at best and, *second*, that appellant's jury actually harbored a reasonable doubt on the issue and, for that reason, did rely on the impermissible presumptions as a basis for the conviction. Under these circumstances, appellee cannot begin to shoulder *its* burden of demon-

strating that the error was harmless beyond a reasonable doubt.

ARGUMENT

I. BECAUSE THE TRIAL COURT'S INSTRUCTIONS PURSUANT TO VEHICLE CODE § 10855 AND PENAL CODE § 484(b) COULD HAVE BEEN REASONABLY INTERPRETED AS DIRECTING A CONCLUSIVE PRESUMPTION ON ONE OR MORE ELEMENTS OF THE OFFENSE, APPELLANT WAS DENIED DUE PROCESS OF LAW.

A presumption is an evidentiary device pursuant to which a jury is instructed that it may or must infer proof of one or more elements of an offense from proof of certain predicate facts. *See generally County Court of Ulster County* v. *Allen*, 442 U.S. 140, 156-60 (1979). Although presumptions are a "staple" of the criminal law, *id.* at 156, their use in any given case must be tested against the "bedrock, axiomatic and elementary" Fourteenth Amendment principle that the State must prove "beyond a reasonable doubt [] every fact necessary to constitute the crime." *In re Winship*, *supra*, 397 U.S. at 363-64 (internal quotations omitted). To the extent a "reasonable juror" could have interpreted the instructions as relieving the prosecution of its constitutional duty to prove its case beyond a reasonable doubt, a conviction cannot stand. *Francis* v. *Franklin*, *supra*, 471 U.S. at 315; *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 514.

Application of these principles requires a "straightforward" two-part inquiry. *Francis* v. *Franklin*, *supra*, 471 U.S. at 313. Because the term "presumption" subsumes a variety of evidentiary devices, the analysis begins with a careful determination of the kind of presumption at issue in the case. *See generally County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 157-63.

Once that determination is made, the reviewing court must then assess the precise presumption involved against the fundamental requirement that the prosecution "prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson* v. *New York*, 432 U.S. 197, 210 (1977). Under this analysis, as we now show, the statutory presumptions presented to appellant's jury were plainly unconstitutional.

A. A Reasonable Juror Could Have Interpreted The Trial Court's Charge As An Impermissible Conclusive Presumption.

Determining the species of presumption at issue in a given case "requires careful attention to the words actually spoken to the jury." *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 514. Because it is the jury, and not the court, that actually applies the charge, the inquiry focuses on the manner in which the jurors themselves might have understood their directions. *Francis* v. *Franklin*, *supra*, 471 U.S. at 313-14; *California* v. *Brown*, 479 U.S. 538, 541 (1987). For that reason, the private understanding of the trial judge or, in the case of a statutory presumption, the actual intent of the legislature that enacted it, are irrelevant. *See Sandstrom* v. *Montana*, *supra*, 442 U.S. at 515-17. Regardless of any such intent, "whether a defendant has been accorded his constitutional rights depends on the way in which a reasonable juror could have interpreted the instruction" as a whole. *Id.* at 514.

As appellee has twice conceded, the jury in this case could have reasonably construed the instructions as requiring a conclusive presumption of grand theft from proof of the predicate facts specified in Vehicle Code §

10855 and Penal Code § 484(b).[13] Indeed, the instruction is not merely susceptible of that interpretation, it virtually demands it. Having first been told that "embezzlement" was a form of theft, JA 10, the jury was instructed that anyone who fails to return a vehicle within five days after the expiration of a rental agreement "*shall be presumed to have embezzled [it].*" JA 15 (emphasis added). Similarly (although perhaps redundantly), the court charged the jury that "intent to commit theft by fraud is presumed" from failure to return rental property within 20 days of demand. JA 15. In both instances, the charge was "cast in the language of command." *Francis* v. *Franklin*, *supra*, 471 U.S. at 316. Because a reasonable juror could have interpreted the instructions as conclusively directing him or her to find appellant guilty of grand theft, the constitutionality of the charge must be evaluated in those terms.[14]

In this regard, as appellee has also conceded, it is of no consequence that California courts have long interpreted

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[13] Motion of Appellee to Dismiss at 10. ("A reasonable juror could . . . have interpreted the presumptions embodied in the instructions as conclusive or mandatory.") In its appellate brief below, appellee stated: "[T]he trial court erroneously instructed the jury with respect to the presumption because it failed to clearly indicate that the jury might have, but was not required, to infer the intent to commit theft by fraud." *Id.* at 10 n.11.

[14] There is nothing in the rest of the instructions to soften the trial court's concrete directive concerning the presumptions. Although the jury was given a general "reasonable doubt" charge, JA 21, this Court has twice held that such a charge is not "rhetorically inconsistent" with an impermissible conclusive presumption. *Francis* v. *Franklin*, *supra*, 471 U.S. at 318-19; *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 518 n.7. The jury could well have interpreted the presumption as a means by which the requirement of proof beyond a reasonable doubt could be satisfied. 471 U.S. at 318-19; 442 U.S. at 518 n.7.

the challenged presumptions to shift only the burden of production. Motion of Appellee to Dismiss at 9-10. As we discuss more fully below, even if analyzed in those terms, the presumptions do not withstand scrutiny under the Due Process Clause. *See infra* pp. 17-35. But, as was the case on two prior occasions, the Court need not reach that issue given the substantial (and acknowledged) risk that the jury understood the charge as directing a conclusive presumption of guilt. *See Francis* v. *Franklin*, *supra*, 471 U.S. at 315 n. 3; *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 515-16.

The Court's unanimous opinion in *Sandstrom* is particularly instructive on this point. There, the State of Montana had contended that under established state-law precedent the presumptions at issue served merely to transfer the burden of production to the defendant. Dismissing the argument, the Court held that—while state courts were the ultimate expositors of the meaning of state law—federal courts were the "final authority on the interpretation which a jury could have given the instruction." 442 U.S. at 516-17. Because the instructions could be reasonably construed as directing a conclusive presumption, the Court held, their constitutionality must stand or fall on those terms—regardless of the intent of state law in the abstract. For precisely the same reasons—whatever may be the unarticulated intention of the underlying statutory provisions—the analytic focus of this case derives from the significant likelihood that appellant's jury interpreted the charge as directing a conclusive presumption of guilt.

B. Because The Instruction Could Have Been Reasonably Interpreted As A Conclusive Presumption, It Deprived Appellant Of Due Process Of Law.

The second part of the inquiry—whether the presumption, as construed, comported with due process—need

not detain the Court long. A presumption's validity turns in large part on the degree to which "the device curtails the factfinder's freedom to assess the evidence independently." *County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 156. Thus, a purely permissive inference—*i.e.*, where a jury is told that it may, but is not required to, assume a relationship between proof of certain predicate facts and an element of the substantive offense—does not run afoul of *Winship*'s command since the prosecution must still prove the relationship between the predicate fact and the suggested conclusion beyond a reasonable doubt. In contrast, a charge that directs jurors to conclusively presume proof of an element solely on the basis of proof of a predicate necessarily relieves the prosecution of its constitutional obligation to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime." *In re Winship*, 397 U.S. at 364. For that reason, as the Court has repeatedly held, such instructions are categorically prohibited by the Fourteenth Amendment.[15]

Appellee concedes that the jury could have interpreted the trial court's instructions as directing a conclusive presumption and, further, that such presumptions are categorically unconstitutional. In light of these concessions, which are fully supported by the record, the analysis need go no further.

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[15] *See, e.g.*, *Francis* v. *Franklin*, *supra*, 471 U.S. at 317; *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 521-23; *Morissette* v. *United States*, 342 U.S. 246, 274-75 (1952). *Cf. Yates* v. *Aiken*, 108 S.Ct. 534 (1988); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 435, 446 (1978).

II. PENAL CODE § 484(b) AND VEHICLE CODE § 10855 VIOLATE DUE PROCESS EVEN IF THE CONCLUSIVE PRESUMPTIONS THEY AUTHORIZE DISSIPATE WHEN A DEFENDANT PRODUCES EVIDENCE IN SUPPORT OF THE NON-EXISTENCE OF THE PRESUMED FACT.

The opinion of the court below could be read to suggest that even if the charge directed the jury to conclusively presume one or more elements of the crime, it was permissible because appellant could have eliminated the presumption by producing evidence to "support . . . the nonexistence" of the presumed fact. JA 61. As discussed above, we believe that any such analysis is foreclosed by the decisions of this Court holding that the dispositive issue is not the intended *operation* of the presumption, but the manner in which its *presentation* might have been interpreted. *See infra* pp. 15-18. In any event, as we suggest in the sections that follow, the Appellate Department's apparent reasoning is incorrect for at least two reasons.

First, although the Court has not yet had an opportunity to test a presumption that shifts the burden of production against *Winship*'s command, Vehicle Code § 10855 and Penal Code § 484(b) clearly compromised appellant's right to have the prosecution prove every element of the offense beyond a reasonable doubt. We do not question that a state, consistent with Due Process, may impose on a criminal defendant the duty to go forward with evidence of an affirmative defense, such as sanity, duress or "heat of passion." Indeed, it may well be permissible to require a defendant to adduce some quantum of evidence pertaining to such mitigating considerations even if not formally denominated an affirmative defense under the applicable state code. Because, in the ordinary run of cases, the facts relating to such considerations are

not in issue in the absence of some indication from the defendant that he contests them, requiring him to bear the burden of production serves a legitimate "housekeeping" function while burdening the *Winship* right very little. But where, as here, the presumed fact concerns the core element of specific intent and where the state already has notice that the element is contested, requiring the defendant to supply rebuttal evidence to avoid a conclusive presumption burdens the right substantially, while serving no legitimate purpose at all.

Second, as a corollary to the *Winship* right, it has long been held that due process requires a tight logical connection between the predicate and presumed facts. *Tot* v. *United States*, 319 U.S. 463, 467 (1943). The requisite degree of tightness depends on the manner in which the presumption operates. *County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 166-67. Where the presumption requires, rather than permits, the jury to presume an elemental fact from proof a predicate, "the fact proved" must be "sufficient to support the inference of guilt beyond a reasonable doubt." *Id.* at 167. If, however, the suggested inference is purely permissive, it will survive a due process challenge if "it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* v. *United States*, *supra*, 395 U.S. at 36. While a presumption that shifts the burden of production does not fit neatly into either category, the manner in which the presumptions operated in this case suggests application of the higher of the two standards. Even under the more forgiving test reserved for permissive inferences, however, it cannot possibly be "said with substantial assurance" that willful retention of a rental car five days beyond the scheduled return date implies an intent to keep it *permanently*.

A. Directing The Jury To Presume All Of The Constituent Elements Of Embezzlement Unless Appellant Offered Sufficient Evidence To Support Their Nonexistence Violated The Due Process Requirement Of *In Re Winship*.

The universe of criminal presumptions is divided into two parts: those that *permit* the jury to infer a relationship between a predicate and an elemental fact, and those that *direct* the jury to infer the relationship—either conclusively or until such time as the defendant offers some quantum of evidence in rebuttal. *See generally County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 156-60. Even if the defendant is allowed to rebut the otherwise conclusive inference, presumptions in the latter category, which are described as "mandatory," clearly implicate the *Winship* principle. *Id.* at 157. Thus, for example, it is well established that a presumption that shifts the burden of persuasion to a defendant—*i.e.*, one that directs a jury to conclusively presume an elemental fact unless the defendant adduces sufficient evidence to disprove it—violates due process. *Francis* v. *Franklin*, *supra*, 471 U.S. at 317. The question we address here is whether a closely related form of mandatory presumption—*i.e.*, one that directs a jury to conclusively presume an elemental fact unless the defendant offers some evidence to support its non-existence—is equally infirm.[16]

We believe that question should be answered in the affirmative in the circumstances of this case. In reaching

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[16] Presumptions of this nature are said to shift the "burden of production." Some courts prefer to describe the same phenomenon as shifting the "burden of going forward." In an area of law not known for the precision of its definitions, the terms appear to be synonymous. The latter formulation, however, seems to be preferred when a party starts out with the burden, as opposed to having it "shifted" to him at some point in the proceedings.

this conclusion, we begin with the observation that a presumption that shifts the burden of production is functionally identical to one that impermissibly shifts the burden of persuasion. In both instances, the jury is told that it *must* presume one or more elements of a crime from proof of a predicate fact unless the defendant offers evidence in rebuttal. Although the quantity of evidence that must be adduced to defeat the presumption is different in each case, a presumption that shifts the burden of production would thus appear to be unconstitutional for precisely the same reasons as one that shifts the burden of persuasion: in both instances, the presumption relieves the prosecution of its Fourteenth Amendment duty to prove each element of a crime beyond a reasonable doubt. Moreover, in both cases the practical consequence of imposing the burden on the defendant is the same: the prosecution can survive a motion to acquit, even if it has offered no evidence whatever pertaining to one or more elements of the crime.

Notwithstanding these close parallels, the analogy between a presumption that shifts the burden of persuasion and one that shifts the burden of production is imperfect in one significant respect. Whereas in the former case the defendant must actually disprove the presumed fact, in the latter, he or she need not go that far. In order to dissipate the presumption, the defendant need only adduce "some" evidence or, as in California, sufficient evidence "to support a finding of [the presumed fact's] nonexistence." Cal. Evidence Code § 604. Thus, while the precise weight of the burden may vary depending on the applicable state-law formulation, it is by definition less onerous to satisfy a burden of production than a burden of

persuasion.[17] The essential question then is whether and, if so, in what circumstances, this distinction spares presumptions that shift the burden of production from the constitutional condemnation that attends all other forms of mandatory presumptions.

Consistent with the Court's prior intimations, we agree that the difference in the weight of the defendant's burden is a proper consideration to weigh in the balance and, further, that the distinction is sufficiently important to preclude a categorical prohibition against presumptions that operate to shift the burden of production.[18] At the same time, as the Court has also suggested, because such presumptions *do* relieve the prosecution of its duty to prove each element of its case beyond a reasonable doubt,

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[17] In point of fact, the somewhat cryptic California formulation appears to impose a significantly heavier burden on the defendant than the parallel formulation in most other states. As a general rule, a defendant satisfies the burden of production if he or she adduces "any" evidence or "some" evidence bearing on the non-existence of the presumed fact. Self evidently, the greater the burden a defendant must carry to satisfy the burden of production, the more it approximates an impermissible burden of persuasion.

[18] As noted above, the Court has twice reserved decision on the constitutionality of presumptions that shift the burden of persuasion. *See supra* p. 15. On two recent occasions, however, the Court alluded to the issue in dictum. In *County Court of Ulster County* v. *Allen*, 442 U.S. at 157 n.16, the Court suggested that an "extremely low burden of production," *e.g.* one that could be satisfied by "any evidence" may have no greater "impact than . . . a permissive inference." *See also Mullaney* v. *Wilbur*, 421 U.S. 684, 701-02 nn. 28 & 30 (1975) (suggesting that a State could require the defendant to produce some evidence of "heat of passion" before the prosecution was required to negate it beyond a reasonable doubt). As explained *infra*, we do not disagree that a defendant may, consistent with due process, be made to bear the burden of production on "heat of passion."

there are plainly limits to a state's discretion in this regard. *See Tot* v. *United States*, *supra*, 319 U.S. at 469 (citing *McFarland* v. *American Sugar Refiners*, 241 U.S. 79, 86 (1915)). Even if the presumption only shifted the burden of production, for example, there can be little doubt that a state could not direct a jury to presume guilt from the return of the indictment itself. *Id.*

As we now explain, we think these limits are best defined by reference to two related considerations: the underlying purpose of burdens of production and the substantive nature of the elemental fact the jury is directed to presume. To the extent requiring a defendant to go forward with evidence serves the legitimate function of notifying the court and the prosecution that the presumed fact is in issue, it will pass constitutional muster. Where, however, the presumed fact is *already* in issue—as will generally be the case for elements of the offense and will always be the case for such core elements as intent or the *actus reus*—the only purpose of shifting the burden of going forward to the defendant is to enable the prosecution to secure a conviction without proving its case. Because that objective is inherently illegitimate, the use of a burden shifting presumption in such cases is patently impermissible.

1. Requiring The Defendant To Produce Evidence Tending To Negate An Element Of A Crime Serves No Legitimate State Interest And Therefore Will Generally Violate Due Process.

Although the device is employed in a variety of contexts, requiring a criminal defendant to "go forward" with evidence on an issue serves a single, rather straightforward procedural objective. By producing evidence pertaining to the issue, the defendant gives notice to both the court and the prosecution that he intends to rely on some statutorily authorized consideration—not otherwise in

the case—that bears on either the fact or degree of his culpability. To the extent allocating the burden of production to the defendant serves that function, it promotes efficient litigation by screening out issues that are extraneous to the case.[19] That objective, we acknowledge, is not only legitimate, but will generally serve as an effective counterpoise to any burden the device may impose on the defendant's Fourteenth Amendment rights.[20]

The principle is well illustrated by the operation of traditional affirmative defenses. In most jurisdictions, the defendant bears the burden of going forward with respect to such matters as duress, necessity or self defense. By introducing evidence pertaining to such defenses, the defendant serves notice that the facts of the case give rise to a triable issue that—although not an element of the crime—bears directly on culpability. Because the constitutent elements of the offense do not change at any point in the process, an affirmative defense is, by definition, "extraneous" to the crime charged in the indictment.[21] Requiring the defendant to inject the issue

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[19] *See* Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1334 (1979).

[20] While the details of the analysis may vary from case to case, Due Process claims invariably reduce to a determination of the "fundamental fairness" of the procedures that led to the deprivation of life, liberty or property. In making that determination, it is often appropriate to consider the interests of both the affected party and the state. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

[21] This is so even where success in carrying the burden of production shifts the burden of persuasion to the State to disprove the defense—*e.g.*, to prove the absence of self defense. That the state must, as a matter of allocation, disprove a defense does not suggest that the absence of the defense is an element of the crime. As the term has developed in this Court's cases, an affirmative defense is, by definition, not an element of the crime. *See, e.g.*, *Martin* v. *Ohio*, 480 U.S. 228, 233 (1987); *Patterson* v. *New York*, 432 U.S. 197, 205-06 (1977).

into the case thus serves the salutary, and entirely permissible, function of identifying the full universe of issues the trier of fact must resolve in order to determine guilt or innocence.[22]

To the same effect is the rule that a defendant is not entitled to a lesser included offense instruction unless he or she adduces some evidence suggestive of the less serious crime. *See, e.g., Hopper* v. *Evans*, 456 U.S. 605 (1982).[23] As with an affirmative defense, evidence pertaining to the lesser crime is, by definition, extraneous to the crime charged. *Sparf* v. *United States*, 156 U.S. 51, 63-64 (1895). Putting the burden on the defendant to produce evidence bearing on the lesser offense thus serves the function of delineating the full range of triable issues in the case. In light of the important interest served by this procedural allocation, the burden on the defendant's right to such a charge is constitutionally tolerable.

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[22] Although, to our knowledge, this Court has never squarely addressed the issue, it has never doubted that a state could place the burden of production on the defendant with respect to an affirmative defense. *See, e.g., United States* v. *Bailey*, 444 U.S. 394 (1980) (duress and necessity). Since a state can require the defendant to carry the burden of persuasion on an affirmative defense, *see Martin* v. *Ohio*, *supra*, it would appear to follow *a fortiori* that it may permissibly require him or her to bear the less onerous burden of production in this context. The only limitation would be with respect to those culpability-related considerations that, as a matter of substantive law, could not be denominated an affirmative defense. *See, Patterson* v. *New York*, *supra*, 432 U.S. at 210; *McMillan* v. *Pennsylvania*, 477 U.S. 79, 100 (1986) (Stevens, J., dissenting).

[23] In capital cases, due process requires a lesser included offense charge when the evidence warrants it. Although the Court has never held that the same rule is constitutionally mandated in other contexts, state and federal courts uniformly apply the identical standard as a matter of common law and statutory interpretation. *See Beck* v. *Alabama*, 447 U.S. 625, 636 n.12 & 637 (1980).

Where, however, the defendant is required to bear the burden of production on an element of the crime—a matter that by definition is *not* extraneous to the case—the allocation necessarily stands on an entirely different footing. Self evidently, requiring the defendant to go forward with evidence in this context does not serve the interest of defining the full set of issues in the case: between the indictment and any affirmative defenses brought to the court's attention, that function has already been fully accomplished. Nor, of course, can the allocation be defended as a means of identifying those issues for which there is sufficient evidence to justify submission to the trier of fact. Because it is never permissible to direct a verdict against a defendant in a criminal case, the quantity or quality of the evidence tending to negate one or more elements of the crime is procedurally irrelevant. *See Rose* v. *Clark*, *supra*, 478 U.S. at 578; *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 516 n.5.

In short, when the defendant must go forward with evidence tending to negate an element of the offense—and where the consequence of failing to carry the burden is to have the matter conclusively presumed against him—the device furthers none of the interests traditionally associated with burdens of production. Indeed, the *only* apparent function of such burden shifting presumptions is to help the prosecution obtain a conviction without directly proving its case—an objective that runs directly counter to both the letter and intent of *In re Winship*.[24]

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[24] That the defendant may have more ready access to information pertaining to the matter is not a sufficient justification for the allocation. *See Tot* v. *United States*, *supra*, 319 U.S. at 469. Such a rule would, of course, prove too much. A defendant virtually always has more direct evidence pertaining to the crime than the prosecution—especially on such basic matters as intent and the *actus reus* itself. *Id.*

A rule whose only purpose is to circumvent a constitutional right cannot be defended on those grounds. Like any other form of mandatory presumption, a device that conclusively presumes an element of a crime if the defendant fails to produce evidence to the contrary compromises the right to have the prosecution prove its case beyond a reasonable doubt. Because the infringement serves no legitimate countervailing state interest, presumptions that shift the burden of production on an element of a crime will generally deprive a defendant of due process of law.

We say "generally," because the relative ease with which the defendant can carry a burden of production—unlike a burden of persuasion—warrants some softness around the edges of an otherwise categorical rule. There may well be some matters, technically denominated "elements" under the applicable state scheme, for which a defendant can be required to bear the burden of production. Thus, for example, where a state makes absence of "heat of passion" or some other mitigating consideration an element of the crime—rather making the obverse an affirmative defense—requiring the defendant to come forward with enough evidence to put the matter in issue has

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Yet that consideration has never been thought to justify evidentiary allocations in derogation of the principle of *In re Winship*. *See, e.g.*, *Francis* v. *Franklin*, *supra* (intent).

Nor can placing the burden of production on the defendant be justified as a legitimate "discovery" device—*i.e.* a means of informing the prosecution of the details of the defense so that it can develop and structure its case accordingly. *Compare* F.R. Crim. P. 12.1 (requiring Defendant to give notice of alibi witnesses as precondition to presenting their testimony at trial). By definition, the prosecution's case is already completed by the time the defendant is even put to the task of "going forward" with evidence.

some intuitive appeal. Regardless of where they are formally housed in the state scheme, such issues are not in the ordinary run of cases and, therefore, as a matter of both fairness and history, it may well be permissible to "presume" their non-existence absent some evidence to the contrary.[25]

Whatever the scope of such exceptions may be, however, we think it clear that they do not extend to such core elements of criminality as intent or the *actus reus*. One or both of these elements is typically, if not invariably, the only matter contested at trial. When an issue is already the centerpiece of the proceedings, requiring the defendant to bear the burden of production—or have the matter conclusively presumed against him—compromises the *Winship* right substantially while serving no rational purpose. In our view, the inherently superfluous quality of

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[25] The authors of the Model Penal Code propose a similar line. Under their formulation, a criminal defendant may be required to introduce some evidence of an affirmative defense in order to inject it into the case. A defense is considered "affirmative" if the applicable code so provides or if "it involves a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence." ALI, Model Penal Code § 1.12(3) (1985). *Cf. McMillan* v. *Pennsylvania*, *supra*, 477 U.S. at 99 (Stevens, J., dissenting) (suggesting that state may define as an affirmative defense matters that tend to mitigate seriousness of the offense). With respect to other forms of presumptions—*i.e.*, those not pertaining to an affirmative offense—the Model Penal Code requires that the jury be charged as follows:

> while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury *may* regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.

ALI, Model Penal Code § 1.12(5)(b) (emphasis added). Thus, for elements of the offense, the jury is told that it may, but need not, infer the elemental fact from the predicate.

the device in this context—in combination with the significant burden on the right—gives rise to a general rule that presumptions that shift the burden of production on either of these essential elements deprive a defendant of due process of law.[26]

2. The Operation Of The Statutory Presumptions In The Particular Circumstances Of This Case Underscore Their Unconstitutionality.

Under this analysis, neither Vehicle Code § 10855 nor Penal Code § 484(b) survive scrutiny under the Due Process Clause. Both presumptions direct the jury to con-

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[26] It is no answer to suggest that an otherwise impermissible presumption is valid if—consistent with the substantive limitations imposed by the Eighth and Fourteenth Amendments—the legislature could have excluded the presumed element from its definition of the crime. The Court has specifically rejected such reasoning on at least two occasions. *See Tot* v. *United States*, *supra*, 319 U.S. at 472 (noting that "for whatever reason" Congress chose to define the crime as it did, and holding that the constitutional analysis would therefore have to take the statute as it found it, not as it might have been drafted). *See also Leary* v. *United States*, *supra*, 395 U.S. at 34 (same). Indeed, if accepted, the "greater power-inlcudes-the-lesser" argument would have required a different result in both *Sandstrom* and *Franklin*—a State could almost certainly punish as murder conduct the natural and probable consequence of which is the death of another. *Cf. Tison* v. *Arizona*, 481 U.S. 137 (1987).

Moreover, predicating the constitutional analysis on the legislature's actual definition of the crime makes sense as a matter of procedural due process. The elements of a crime define the set of conditions that, if present, justify a deprivation of liberty. Thus, the statutory definition of the crime generates an enforceable expectation—itself protected by the due process clause—of a continued entitlement to freedom so long as one or more of such elements is lacking. Because the entitlement is defined by the statute itself, what the legislature "might have done" is irrelevant to the requirements of due process.

clusively presume specific intent unless the defendant adduces sufficient evidence to "support" the element's non-existence. Indeed, the former goes even further by directing an equivalent presumption with respect to *every* element of the offense of theft by embezzlement—including both specific intent and the *actus reus*. While we have difficulty imagining an application of either statute that would withstand a challenge under the Due Process Clause, as we now explain, their unconstitutionality is especially apparent in the particular circumstances of this case.

Even if one accepts the conclusion that appellant offered no evidence to support the "nonexistence of the presumed facts," there can be no doubt that those matters were hotly contested throughout the trial.[27] JA 61. Because appellant's retention of the car beyond the contract date was not in dispute, the *only* issue in the case was whether he had specifically intended to steal it. More particularly, the case turned on whether appellant had intended to retain the car permanently—the element that distinguishes grand theft from a violation of Vehicle Code § 10851.

As a review of the record makes clear, appellant made every effort to address these crucial issues at each stage of the proceedings. In his motion to dismiss the complaint, he explicitly denied having the requisite intent. JA 26-27. And, at trial, the testimony he elicited from both of his

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[27] Focusing exclusively on appellant's "testimony," the appellate court did not consider or reject the possibility that the *State's* witnesses provided evidence supporting "the non-existence of the presumed facts." As we point out below, at least one aspect of the State's evidence was inconsistent with an intent to keep the car permanently. *See infra* p. 39.

witnesses was plainly designed to support that contention. *See supra* pp. 5-7. Finally, and most telling of all, the jurors' query concerning the operation of the presumptions indicates that they, at least, understood that the case revolved around the disputed (and close) issue of appellant's intent to "*permanently*" deprive the owner of possession. JA 23 (emphasis in original). Indeed, the only reasonable inference to be drawn from this last-minute inquiry is that, without the benefit of the presumptions, the State had failed to prove the requisite intent to the jury's satisfaction.

This brief review of the proceedings, in our view, makes two points abundantly clear. First, requiring appellant to go forward with evidence to negate the presumption of intent did not serve the functional objective of injecting the issue into the case—both the Court and the prosecution were *already* on notice that that precise issue would be the focus of the entire trial, as indeed it was. Second, there is every reason to believe that the presumptions not only made a difference in the outcome, but did so in a manner directly at odds with the "bedrock, axiomatic and elementary" Fourteenth Amendment principle that the State must prove every element of the offense beyond a reasonable doubt. *In re Winship*, *supra*, 397 U.S. at 363-64 (internal quotations omitted). Whatever may be the general rule concerning presumptions that shift the burden of production, their operation in the circumstances of this case deprived appellant of due process of law.

B. The Absence Of A Sufficient Connection Between The Predicate And Presumed Facts Renders Vehicle Code § 10855 Independently Unconstitutional.

In addition to complying with the specific mandate of *In re Winship*, criminal presumptions must satisfy a second

requirement to comport with due process. Even if the presumption serves only to shift the burden of production, the logical connection between the predicate and the presumed facts must, at minimum, be sufficiently tight to guard against an irrational jury verdict. *See Tot* v. *United States*, *supra*, 319 U.S. at 467-69; *see generally County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 163-67. While existing case law leaves some doubt as to the precise standard to be applied in this context, Vehicle Code § 10855 fails under even the most forgiving formulation of the test.[28]

Even when a presumption merely authorizes a permissive inference—that is where the jury is told that it may, but need not, infer an elemental fact from proof of a predicate—due process requires a "rational connection" between the proven and the inferred facts. *See United States* v. *Gainey*, 380 U.S. 63, 66 (1965). Under the controlling test, presumptions of this nature are invalid "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* v. *United States*, *supra*, 395 U.S. at 36. *See also*, *Barnes* v.

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[28] While we believe that Penal Code § 484(b) is equally infirm, we focus exclusively on Vehicle Code § 10855 for two related reasons. First, the relationship between the presumed and predicate facts is even more tenuous for the latter than for the former. Thus, if the Court disagrees with our submission and upholds Vehicle Code § 10855, a similar conclusion with respect to Penal Code § 484(b) would appear to follow *a fortiori*. Second, if Vehicle Code § 10855 falls, the constitutionality of the latter provision would be irrelevant. Where, as here, it is impossible to know which of two provisions a jury may have relied on, the fact that one may be constitutional does not save the verdict if the other was not. *Bachellar* v. *Maryland*, 397 U.S. 564, 569-71 (1970).

United States, 412 U.S. 837, 842 (1973); *Turner* v. *United States*, 396 U.S. 398, 404-05 (1970).

Mandatory presumptions, in contrast, must satisfy a significantly more stringent standard. In such cases, the jury is *directed* to rely on the presumption—*i.e.*, to find an element of the offense from proof of a non-elemental fact. Because such presumptions necessarily implicate the *Winship* right, due process requires a far tighter connection between the predicate and presumed facts. As the Court has suggested on a number of occasions, presumptions of that nature are invalid unless "the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." *County Court of Ulster County* v. *Allen*, *supra*, 442 U.S. at 167.[29] Any lesser showing would permit the prosecution to obtain a conviction even though it had not proved its case to the requisite level of certainty.[30]

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[29] *See also Barnes* v. *United States*, *supra*, 412 U.S. at 845-46 (finding presumption permissible under "reasonable doubt standard"); *Leary* v. *United States*, *supra*, 395 U.S. at 36 n.64 (declining to decide whether presumption must satisfy reasonable-doubt standard since it failed even the "more likely-than-not" test); *Turner* v. *United States*, *supra*, 396 U.S. at 416 (holding that presumption failed under either standard).

[30] In point of fact, the more stringent formulation is largely redundant of—and may have been superseded by—the generic condemnation of mandatory presumptions in *Sandstrom* v. *Montana* and *Francis* v. *Franklin*. The two lines of cases could be read together to suggest that mandatory criminal presumptions are intrinsically unconstitutional unless the predicate fact is so suggestive of the element that the connection can be inferred beyond a reasonable doubt. The inquiry would look to the "presumption's accuracy in the run of cases" and not to the circumstances of the particular case before the court. *County Court of Ulster County*, *supra*, 442 U.S. at 159. As explained in text, the inference directed by Vehicle Code § 10855 falls far short of satisfying that standard.

While we believe that the statutory presumptions at issue in this case—like any other form of mandatory presumption—warrant analysis under the more demanding of the two tests, there is no reason to decide that issue here.[31] Even if the appropriate measure were the test articulated in *Leary* v. *United States*, *supra*, it cannot be "said with substantial assurance that the presumed fact"—intent to deprive the owner of *permanent* possession—"is more likely than not to flow from the proved fact"—willful retention of the vehicle more than five days beyond the contract date. 395 U.S. at 36.

There are obviously a host of reasons—well short of felonious intent—that might lead a customer to willfully retain a rental car five days beyond the designated due date. Undoubtedly the most common is a change in business plans coupled with the natural, although perhaps mistaken, perception that the rental car company would be largely indifferent to a few extra days provided that the appropriate fee is paid upon return.[32] It is not our intention to defend either the accuracy of the perception or the appropriateness of the conduct based upon it. We do believe, however, that it is sufficiently commonplace to undermine the rationality of a scheme that categorically

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[31] Regardless of whether the instructions were triggered by appellant's failure to carry the burden of production, the jury was explicitly directed to presume an element of the offense from proof of a predicate. Thus, unless it could be shown that the presumed fact followed virtually inescapably from proof of the predicate, the charge relieved the prosecution of its obligation to prove every element of the offense beyond a reasonable doubt.

[32] To give but one example, Washington Post reporter Carl Bernstein reportedly became so ensconced in an investigation that he left a rental car in a garage for two months. Thompson, *Red-Diaper Bernstein*, Vanity Fair, Mar. 1989 at 94.

presumes embezzlement—including the constitutent element of specific intent to steal—solely from a deliberate failure to return the car within five days of the formal expiration of the contract.

In this regard, the particular circumstances of this case—specifically, the fact that appellant retained the car for considerably more than five extra days—are irrelevant to the constitutional inquiry.[33] As the Court made clear in *County Court of Ulster County*, 442 U.S. at 157-59, challenges to the rationality of mandatory presumptions are necessarily facial. Because "the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and [is] based on the presumption's accuracy in the run of cases." *Id.* at 159. Given this generic focus, the only pertinent question is whether failure to return a rental vehicle within five days of its due date "is more likely than not" to suggest a felonious intent to keep it permanently. Because that question can only be answered in the negative, the logical connection between the predicate and presumed facts set out in Vehicle Code § 10855 is far too tenuous to survive scrutiny under the Due Process Clause.

In sum, as in both *Sandstrom* and *Franklin*, the dispositive question in this appeal is whether the jury would have reasonably interpreted the trial court's charge as directing an impermissible conclusive presumption. As appellee has twice conceded, that question must be

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[33] While these facts may bear on the separate issue of harmless error, they have no relevance to the necessarily antecedent issue of the existence of the violation itself.

answered in the affirmative. But even if the appropriate analytic focus were the facial validity of Vehicle Code § 10855 and Penal Code § 484(b), they would not survive scrutiny under the Due Process Clause. By requiring the defendant to go forward with evidence to negate the central element of specific intent, they impose an unacceptable burden on the right delineated in *In re Winship*. Moreover, at least with respect to Vehicle Code § 10855, the inference it directs is insufficiently rational to satisfy the demands of due process.

III. EVEN IF *CHAPMAN* v. *CALIFORNIA* IS APPLICABLE IN THIS CONTEXT, THE CONSTITUTIONAL ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Having conceded that the trial court's instructions pursuant to Vehicle Code § 10855 and Penal Code § 484(b) directed an impermissible conclusive presumption, appellee contends that the conviction may still stand because the error was "harmless." Motion to Dismiss at 10-11. The argument must fail for two independent reasons. First, unlike mandatory *rebuttable* presumptions, *see Rose* v. *Clark*, *supra*, an instruction that directs a jury to conclusively presume an element of an offense is not even subject to harmless-error analysis. Second, even if the error were an appropriate subject for such review, appellee cannot possibly demonstrate on this record that it was "harmless beyond a reasonable doubt." *Chapman* v. *California*, *supra*, 386 U.S. at 24.

A. Since The Trial Court Instructed The Jury to Conclusively Presume Embezzlement From A Non-Elemental Fact, The Violation Is Not Subject To Harmless-Error Review.

In the sections above, we suggest that the statutory presumptions at issue in this appeal are unconstitutional

under either of two theories. Part II contends that, even if the appropriate inquiry were whether a state may permissibly shift the burden of production on an element of an offense, Vehicle Code § 10855 and Penal Code § 484(b) violate the due process principles of *In re Winship* and *Leary* v. *United States*. Our principal submission, however, is that—regardless of the intended operation of the challenged provisions—the instructions premised on them impermissibly directed appellant's jury to presume his guilt from proof of a non-elemental fact. *See supra*, pp. 12-16. If, consistent with its prior decisions, the Court agrees that the case is appropriately analyzed in these latter terms, we doubt that the violation is even subject to harmless-error review.

Unlike a mandatory *rebuttable* presumption, an instruction that directs a jury to conclusively presume guilt from proof of a predicate fact is analytically identical to a directed verdict. *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 516 & 516 n.5; *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 435, 446. *Morissette* v. *United States*, *supra*, 342 U.S. at 274-75. The circumstances of this case illustrate the point well. By instructing appellant's jury to presume embezzlement from failure to return the car within five days of the contract date—a fact that was not contested—the court removed the issue of guilt from the jury's consideration as effectively as if it had declined to submit it altogether.[34]

In this crucial respect, the present case is distinguishable from *Rose* v. *Clark*, *supra*. There, respondent's jury had been instructed to presume malice from proof of a killing, but had been further instructed that "the pre-

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[34] The law presumes that jurors follow the instructions they are given. *Francis* v. *Franklin*, *supra*, 471 U.S. at 324 n.9.

sumption [could] be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State." 478 U.S. at 574. Although unconstitutional for other reasons, *see Francis* v. *Franklin*, *supra*, instructions of that nature do not have the effect of "automatically directing a finding" on any or all elements of the offense. *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 516. Unlike the instant case, those essential matters were given to Clark's jury and remained in its hands throughout its deliberations.

The distinction between the mandatory conclusive presumption presented to appellant's jury and the mandatory rebuttable presumption at issue in *Rose* v. *Clark* is central to assessing the appropriateness of harmless-error analysis.[35] In the latter context, the error lies in the possibility that the prosecution failed to shoulder the full burden mandated by *In re Winship*. As *Rose* v. *Clark* makes clear, that possibility becomes legally irrelevant if the evidence is so suggestive of the presumed fact "that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." 478 U.S. at 583. Mandatory conclusive presumptions, in contrast, suffer from an additional infirmity. Since the presumption serves to take the matter from the jury altogether, "the error in such . . . case[s] is that the wrong entity judged the defendant guilty." *Id.* at 578. Because a defendant in a serious criminal case is entitled to have the jury determine guilt or innocence—regardless of the weight of the evidence—such errors are, by their very nature, prejudicial. For that reason, as the Court has

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[35] *See Rose* v. *Clark*, 478 U.S. at 591 n.2 (Blackmun, J., dissenting) (noting that decision only concerns rebuttable presumptions).

already observed with respect to directed verdicts, errors with this impermissible effect can never be harmless. *Id.*[36]

B. The Error Was Not Harmless Beyond A Reasonable Doubt.

Even if the Court were to conclude that the violation is subject to harmless-error analysis, the result would be the same.[37] "*Chapman* mandates consideration of the entire record" to determine whether an error is harmless beyond a reasonable doubt. *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983). *See also*, *Rose* v. *Clark*, *supra*, 478 U.S. at 583. Review of the full record in this case shows two things with unusual clarity. First, the State's evidence on the dispositive issue of appellant's intent to retain the car *permanently* was equivocal at best. Second, the jury explicitly recognized the equivocal nature of the evidence and, for that reason, *did* find it "[n]ecessary to

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[36] A number of states, including California, have concluded that a mandatory conclusive presumption, "having removed an element of the crime from consideration by the jury, is reversible per se." *People* v. *Hedrick*, 105 Cal. App. 3d 166, 172, 164 Cal. Rptr. 169, 172 (3d Dist. 1980). *Accord*, *Vermont* v. *Martell*, 143 Vt. 275, 465 A.2d 1346 (1983).

[37] Contrary to appellee's suggestion in its Motion to Dismiss, the Appellate Department's conclusion that "substantial evidence supports [the] conviction" can hardly be construed as a determination that the error was harmless beyond a reasonable doubt. JA 61. Having found no error, the court below had no occasion to undertake a harmless-error analysis, and did not do so. Even though the issue was not addressed below, the record so clearly demonstrates that the error was prejudicial that no purpose would be served by a remand on this issue. This is especially so since there is no trial transcript available for review. *See supra*, n.11. Thus, the court below is not in an appreciably better position than this Court to undertake the harmless-error inquiry in the first instance.

rely on the presumption." *Rose* v. *Clark*, *supra*, 478 U.S. at 583.

As will typically be the case with *mens rea*, the prosecution adduced no direct evidence suggesting that appellant specifically intended to deprive the owner of permanent possession of the car. While the circumstantial evidence may have been sufficient to *permit* the jury to infer such an intent, hardly is the inference so "overpowering" that "no rational jury" would fail to draw it. *Rose* v. *Clark*, 478 U.S. at 580-81.

Indeed, in several important respects the evidence pointed towards the opposite conclusion. Thus, for example, it was undisputed that the car was found at the local business address provided by appellant at the time he executed the contract. Surely a person who intends to abscond with a rental car permanently would not keep it at an address where he could be so easily traced—particularly if, as the prosecution alleged, he knew that the owner was endeavoring to contact him.

To the same effect was the testimony of Paula Pfister. As recounted in the Settled Statement on Appeal, she testified that more than two weeks after the expiration of the rental agreement, she accompanied appellant to a location "close to the MPG rental office" at a time when he had "a large amount of cash with him." JA 38. Thus, the record is clear that the jury knew of an excursion that placed appellant near the offices of the rental car company with the means to pay his debt upon return of the car. Although one must look to a subsequent affidavit for *her* explanation of the linkage between these facts—*i.e.*, that appellant "had substantial monies with him . . . for the purpose of making further and additional payments on his account"—such an explicit statement was unnecessary

for the jury to draw this obvious conclusion from the testimony she presented. JA 66. Thus, even if her testimony is cast in the self-serving light of the Settled Statement, *see supra* n.8, it is sufficient to generate a reasonable doubt concerning appellant's intent.

Moreover, quite aside from the weight of the evidence, there is every indication in the record that the jury actually *did* harbor reasonable doubt concerning the element of intent. In the second day of its deliberations, the jury posed two related questions: (1) whether grand theft "included the legal requirement of *permanent* deprivation of possession;" and (2) whether it is "considered permanent if he keeps the car over 5 days of the contract date [,] [o]r 30 days." JA 23 (emphasis in original). After the trial judge re-read the offending instructions, the jury deliberated for nine additional minutes and then found appellant guilty of grand theft. As this Court has already observed in remarkably similar circumstances, this "course of events" is fatal to any suggestion that "the jury paid no attention [to the] misdirection." *Bollenbach* v. *United States*, 326 U.S. 607, 611 (1946).[38] To the contrary, the jurors' eleventh-hour query permits only the opposite inference: that the State's proof left them with substantial

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[38] In *Bollenbach*, the jury deliberated for seven hours and then sought clarification from the court on the meaning of its instructions. The query elicited a supplemental charge that contained an impermissible presumption. Five minutes later, the jury returned a verdict of guilty. 326 U.S. at 610. Responding to the government's argument that the faulty charge had made no difference, the Court stated:

> We can pay no attention to this misdirection only by assuming that the jury paid no attention to it and that the case is before us as though no misdirection had been given. *To do so is to disregard the significance of the course of events, as revealed by the record, after the case went to the jury.*

326 U.S. at 611 (emphasis added).

doubts about the level of appellant's intent; and that, having been re-instructed to rely on the improper presumptions to resolve the matter, they proceeded to do so.

Under these circumstances, appellee cannot carry *its* burden of proving that the error was harmless. As the jury's last minute inquiry confirms, the evidence pertaining to the crucial element of specific intent was anything but "dispositive"—and is surely insufficient to allow a "reviewing court [to] say beyond a reasonable doubt that the jury would have found" such intent even without the benefit of the presumptions. *Rose* v. *Clark*, *supra*, 478 U.S. at 583. Indeed, given the substantial indications that the jury *did* "rely on the presumption[s]," there is no need to even speculate on the matter. *Id.* Because, as appellee concedes, the trial court's directions to the jury were unconstitutional, and because those directions plainly made a difference in the outcome of the trial, appellant's conviction must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Appellate Department should be reversed.

Respectfully submitted,

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NO. 87-6997

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

EUGENE JOHN CARELLA,
APPELLANT,

v.

STATE OF CALIFORNIA,
APPELLEE.

BRIEF OF APPELLEE

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QUESTIONS PRESENTED

1. Whether appellant was denied due process of law by a jury instruction, given pursuant to California Vehicle Code section 10855, that an individual who willfully and intentionally fails to return a rental car within five days after the rental agreement has expired is presumed to have embezzled the vehicle.

2. Whether California Vehicle Code section 10855 violates due process of law.

3. Whether appellant was denied due process of law by a jury instruction, given pursuant to California Penal Code section 484, subdivision (b), that intent to commit theft by fraud is presumed when an individual who has rented property pursuant to a written contract fails to return it to its owner within 20 days after the owner has made written demand by registered mail following the expiration of the written agreement.

4. Whether California Penal Code section 484, subdivision (b) violates due process of law.

5. Whether, assuming there was instructional error, the *Chapman* harmless-error test can apply to the instant case.

6. Whether this Court or the court below should undertake the harmless-error inquiry in the first instance.

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NO. 87-6997

IN THE
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October Term, 1988

EUGENE JOHN CARELLA,
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v.

STATE OF CALIFORNIA,
APPELLEE.

ON APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee hereby adopts the statement of the case set forth by Appellant in his brief[1], except for the paragraph numbered 1,[2] subject to the following corrections or additions:

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1. Brief of Appellant, 2-9.

2. Brief of Appellant, 2-4. Numbered paragraph 1 consists of an exposition of what appellant conceives to be the relevant law of California. Since this exposition is in our view incomplete and, indeed, unintentionally misleading in a few respects, we propose to discuss the applicable California law in our argument.

(1) Appellant recites at page 5 of the brief that Ms. Ayres "was unable to corroborate appellant's assertion that he had telephoned that evening to talk to the detective who had been inquiring about the status of the rental car." The point is that there was no evidence of such an assertion by defendant, who did not testify at his trial.

(2) Appellant describes at page 6 the conflict as to what Ms. Pfister testified at the trial, referring to her declaration which was filed with appellant's petition for rehearing in the court below and to what is contained in the settled statement on appeal. In our view, appellant has improperly referred to the contents of Ms. Pfister's declaration since, under California law, statements contained in affidavits or declarations filed concurrently with a petition for rehearing are not to be considered as part of the record on appeal for the purpose of ascertaining what evidence was presented at a criminal trial. *See People* v. *Washington*, 71 Cal.2d 1061, 1086, 80 Cal.Rptr. 567, 458 P.2d 479, 493-494 (Cal. 1969).[3]

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3. This Court noted probable jurisdiction as to only Questions I, II, III, IV, V, and VII presented by the jurisdictional statement. JA 77. Accordingly, whether the court below properly denied appellant's requests that reporter's transcript of the trial proceedings be included in the record on appeal is not before the Court in the instant proceeding; and it must be presumed by this Court that these requests were properly denied. However, this is not to say that this Court is precluded from properly concluding that the record on appeal, given the absence of a reporter's transcript of the trial proceedings, provides an insufficient basis for this Court to conclude that instructional error was harmless beyond a reasonable doubt.

It should be incidentally noted that appellant's motion for the reporter's transcript, which his brief at page 9 reports as having been denied by order on January 28, 1988, was filed on January 26, 1988. JA 49-59. This motion was hence filed after the filing of briefs and on the date set for oral argument, at which appellant did not appear. (See Motion of Appellee to Dismiss, at App 16.)

SUMMARY OF ARGUMENT

Appellant not only claims instructional error. He also contends that Penal Code section 484, subdivison (b)[4] and Vehicle Code section 10855[5] violate due process of law. Whatever the outcome of this particular case, the People of the State of California are interested in preserving the viability of both statutes, as authoritatively construed by the appellate courts of California so as to preserve their constitutionality.

The presumptions embodied in these statutes are presumptions affecting the burden of producing evidence. Such presumptions are inoperative if evidence is introduced which would support a finding of the nonexistence of the presumed fact.

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4. This statute provides:

> Except as provided in Section 10855 of the Vehicle Code, intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

Cal. Pen. Code, § 484, subd. (b) (West Ann. 1988).

All statutory references herein are to California statutes, unless otherwise indicated.

5. This statute provides:

> Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

Cal. Veh. Code, § 10855 (West Ann. 1987).

Penal Code section 484, subdivision (b) and Vehicle Code section 10855 will be hereafter cited respectively as §§ 484, subd. (b) and 10855.

As a matter of policy established in California decisional law, statutes that define mandatory presumptions which lessen the prosecution's burden of proof with respect to an element of an offense are to be so constructed so as to save their constitutionality. Sections 484, subd. (b) and 10855 can be properly construed, as a matter of state law, so as to not offend the due process of law clause of the Fourteenth Amendment.

We concede that the trial court committed error with respect to its instructions pertaining to the §§ 484, subd. (b) and 10855 because these instructions offended due process of law. The court below, however, concluded there was no instructional error. It construed both statutes in question as defining presumptions affecting the production of evidence without the requirement that juries be instructed that the burden of producing evidence is discharged by the introduction of some evidence which would support of finding of the nonexistence of the ultimate fact. As construed by the court below, the statutes offend due process of law because the trial court is not required to appropriately instruct the jury about the legal effect of the presumption. Thus the court below interpreted the statutes contrary to California law since its construction does not save their constitutionality.

The constitutionality of §§ 484, subd.(b) and 10855 can *surely* be saved were the statutes construed to authorize permissive inferences rather than mandatory conclusive presumptions.[6] Another possible construction which would *surely* save the constitutionality of both statues would be to

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6. The jury would not be instructed about the permissive inference unless the trial court first found that there was no evidence introduced which would support the nonexistence of the ultimate fact. Moreover, with respect to this possible construction, the instruction would not advise the jury that the permissive inference is not to be made if some evidence is introduced which would support the nonexistence of the ultimate fact.

construe them as presumptions affecting the burden of production of evidence, but with the requirement that the jurors be instructed that if no evidence was introduced which would support the finding of the nonexistence of the ultimate fact, they *may but are not required to* infer the ultimate fact from the predicate fact.[7] In the case of either construction of the statutes, the jurors are not required to assume the existence of the ultimate fact given the predicate fact.

Another construction *may* save the constitutionality of the statutes, provided this Court upholds the validity of mandatory presumptions affecting the burden of production where it is required that the jury be appropriately instructed as to the effect of the presumption.

In the case of a permissive inference, or a mandatory presumption affecting the burden of producing evidence, due process of law requires that there be a rational connection between the basic facts proved and the ultimate fact presumed and that the latter is more likely than not to flow from the former.

Sections 484, subdivision (b) and 10855 satisfy this requirement once it is clearly understood that the crime of embezzlement, under California law, does not include among its elements the specific intent to *permanently* deprive the owner of possession of the misappropriated property. Since § 10855 by its terms pertains to embezzlement, the authorized ultimate fact includes the intent to permanently or temporarily deprive the owner of his property.

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7. However, if evidence were introduced which would support the finding of the nonexistence of the ultimate fact, the jury would not be given the applicable instruction.

Since § 484, subd. (b) pertains to the intent to commit theft by fraud, it must encompass larceny by trick and device as well as by embezzlement. It therefore appears that here again the "presumption" pertains to an intent to permanently or temporarily deprive the owner of his property. Let us assume *arguendo* that the intent to commit theft by fraud referred to in § 484, subd. (b) entails the intent to permanently deprive the owner of his property, and that the intent to permanently deprive the owner of his property is not more likely than not to flow from the basic facts proved. Nevertheless, insofar as the intent to deprive a person *permanently* of his property entails the lesser intent to deprive a person *temporarily* of his property, this lesser intent is more likely than not to flow from the basic facts proved.

In the instant case, the trial court erred insofar as it instructed the jury that theft necessarily includes the element of an intent to permanently deprive the owner of his property, since embezzlement, a species of theft, does not include this element. This error, however, must be considered as harmless beyond a reasonable doubt since the jury was instructed with respect to the theory of embezzlement, and it is certain that a rational jury would have determined that the intent to deprive the owner of his car was formed after appellant had acquired possession of it.

The trial court committed error, in violation of federal constitutional law, when it failed to *either* instruct the jurors that they may but were not required to infer the ultimate fact from the basic fact *or* that they were not required to infer the ultimate fact from the basic fact if some evidence had been introduced which would support the finding of the nonexistence of the ultimate fact.

The harmless-error test of *Chapman* v. *California*, 386 U.S. 18 (1967) can be properly applied to instructional error

either by this Court or the court below. After reflection, we no longer adhere to the view that this is an appropriate case for this Court to undertake harmless-error review. Our conclusion is that this Court should remand the matter to the court below with instructions to consider whether the instructional error was harmless beyond a reasonable doubt, after first considering what is the relevant California law.

We first discuss why §§ 484, subd. (b) and 10855, under California law, can be so construed as to save their constitutionality against the contention that they embody mandatory conclusive presumptions in violation of due process of law.[8]

ARGUMENT

I

AS AUTHORITATIVELY CONSTRUED, THE STATUTES UNDER REVIEW ARE CONSTITUTIONALLY VALID

A

FACTUALLY WARRANTED PERMISSIVE INFERENCES ARE CONSTITUTIONALLY VALID; THE VALIDITY OF MANDATORY PRESUMPTIONS AFFECTING BURDENS OF PRODUCING EVIDENCE IS AN OPEN QUESTION

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8. Our discussion will assume *arguendo* that, under California law, the crime of embezzlement does not include among its elements the intent to permanently deprive of owner of his property. We shall also assume that the "presumptions" in §§ 484, subd. (b) and 10855 satisfy the requirement that the ultimate fact in each flows more often than not from the basic facts. The basis for these assumptions is explained in Parts II and III.

According to California law, presumptions created by §§ 484, subd. (b) and 10855 are characterized as presumptions affecting the burden of producing evidence.[9] Subdivision (d) of Penal Code section 484, provides: "The presumptions created in subdivisions (b) and (c) are presumptions affecting the burden of producing evidence."[10] Cal. Pen. Code, § 484, subd. (d) (West Ann. 1988). It was held in *People* v. *Hemmer*, 19 Cal.App.3d 1052, 1062, 97 Cal.Rptr. 516 (Cal.Ct.App. 1971) that "Vehicle Code section 10855 . . . is a presumption affecting the burden of producing evidence." According to Evidence Code section 604,

> The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or

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9. The presumptions are not inconsistent, and we proceed upon the assumption, as did appellant (Brief of Appellant, 3) that the jury can be instructed pursuant to both statutes in an appropriate case -- assuming, of course, that both statutes are valid.

10. Subdivision (c) of Penal Code section 484, provides:

> Notwithstanding the provisions of subdivision (b), if one presents with criminal intent identification which bears a false or fictitious name or address for the purpose of obtaining the lease or rental of the personal property of another, the presumption created herein shall apply upon the failure of the lessee to return the rental property at the expiration of the lease or rental agreement, and no written demand for the return of the leased or rented property shall be required.

Cal. Pen. Code, § 484, subd. (c) (West Ann. 1988).

The jury was not instructed with respect to this presumption even though there was some evidence from which it might be inferred that appellant falsely represented what were his residence and business addresses. JA 37.

> nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate."[11]

If evidence is introduced which is sufficient to support a finding of the nonexistence of the presumed fact, a jury instruction based upon the presumption affecting the burden of producing evidence should not be given. *People* v. *Hemmer, supra,* 19 Cal.App.3d at 1061. Moreover, where no evidence is introduced which is sufficient to support a finding of the nonexistence of the presumed fact, California statutory law does not require that the jury be informed that the ultimate fact is to be presumed unless evidence is introduced which would support a finding of its nonexistence.

The court below correctly noted that the statutory presumptions in question are defined under California law as presumptions affecting the burden of producing evidence, and then declared that "[t]he effect of such presumptions, under Evidence Code section 604 [quoted above], is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence." JA 61. However, it failed to

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11. Cal. Evid. Code, § 604 (West Ann. 1966).

Evidence Code section 600 provides:

> (a) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.
>
> (b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

Cal. Evid. Code, § 600 (West Ann. 1966).

perceive that as a matter of federal constitutional law, as established in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) and *Francis* v. *Franklin*, 471 U.S. 307 (1985), a statutory mandatory presumption lessening the prosecution's burden of proof beyond a reasonable doubt of an element of the offense charged is constitutionally defective, whether or not it creates a burden affecting the production of evidence.

As *Sandstrom* itself makes clear, the mere characterization as a matter of state law of a statutory presumption as one which affects the burden of production does not remedy the defect if the jury is required to infer the ultimate fact from the basic fact without being told that this duty is discharged if some evidence is introduced which discharges the burden of production. In *Sandstrom*, this Court noted that the Montana Supreme Court had "decisively established that the presumption [*i.e.*, "the law presumes that a person intends the ordinary consequences of his voluntary acts"] at most affected only the burden of going forward with evidence of intent - that is, the burden of production." However, the jury was not told that the presumption could be rebutted by the introduction of some evidence, nor even that it could be rebutted at all. 442 U.S. at 516-517. Hence we feel compelled to concede the *Sandstrom* rule applies to California mandatory presumptions affecting the burden of production of evidence as to an element of an offense in a criminal prosecution, and that this rule was not properly implemented in the case at bar. 442 U.S. at 515-519.

This Court has declared that "[a] permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in the light of proven facts before the jury." *Francis* v. *Franklin*, *supra*, 471 U.S. at 314-315. As this Court, in upholding the validity of a statutory "permissive presumption" that presence of a firearm in an automobile is evidence of its

illegal possession by all occupants, explained in *Ulster County Court* v. *Allen*, 442 U.S. 140, 157 (1979):

> Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond the reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

There are three ways in which a statute may be construed so as to save its constitutionality. In one version of this construction the jurors would be instructed that they may but are not required to infer the ultimate fact from the predicate fact, but would not be additionally instructed that they may make this inference only if there is no evidence which would support the finding of the nonexistence of the ultimate fact. In another version, the jurors would receive the additional instruction just noted. In the latter version, the statute could be understood as defining a "permissive presumption" affecting the burden of producing evidence. Of course, our discussion is understood as pertaining to applications of "presumptions" to elements of an offense incident to a criminal prosecution.

In addition to the two constructions discussed in the preceding paragraph, there is a third way by which the constitutionality of a statute affecting the burden of the production of evidence may be upheld. It is possible that a mandatory presumption that shifts only a burden of production of evidence to the defendant as to an element of the offense is consistent with the Due Process Clause -- provided that

jurors are appropriately instructed about the effect of the presumption. *Sandstrom*, 441 U.S. at 516-517. This is the case because "[t]o the extent that a presumption imposes an extremely low bu den of production - *e.g.*, being satisfied by 'any' evidence - it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such." *Ulster County Court* v. *Allen*, 442 U.S. at 157 n. 16. However, as this Court has made clear in *Francis* v. *Franklin*, 471 at 314 n. 3, the constitutionality of mandatory presumptions affecting the burden of producing evidence is considered as an open question.

As long as the validity of a mandatory presumption affecting the burden of producing evidence is an open question, a state appellate court may well decide to construe a statute defining this type of presumption as simply requiring that the jurors be instructed that the "presumption" is permissive, or is permissive but inoperative if there is some evidence which would support a finding of the nonexistence of the ultimate fact.

We now proceed to show how, under California law, statutes defining mandatory presumptions affecting the burden of producing evidence which lessen the prosecution's burden of proof beyond a reasonable doubt must and can be construed in order to save their constitutionality.

B

CALIFORNIA LAW REQUIRES THAT SECTIONS 484, SUBDIVISION (B) AND 10855 BE SO CONSTRUED SO AS TO SAVE THEIR CONSTITUTIONALITY

In *People* v. *Roder*, 33 Cal.3d 491, 189 Cal.Rptr. 501, 658 P.2d 1302 (Cal. 1983), the California Supreme Court considered the presumption embodied in Penal Code section 496 that a person shall be presumed to have bought or received property knowing it to have been so stolen or obtained, provided that the People prove three of the statute's four basic facts.[12] The California Supreme Court concluded that the statute clearly established a mandatory presumption within the meaning of *Sandstrom*. 33 Cal.3d at 499, 658 P.2d at 1307. Considered in the light of *Ulster County Court* and *Sandstrom*, subdivision 2 was deemed by the California Supreme Court to be a presumption affecting a burden of

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12. This statute provides in pertinent part:

> Every swap meet vendor as defined in Section 21661 of the Business and Professions Code and every person who principal business is dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee or representative of such person, who buys or receives any property which has been stolen or obtained in any manner constituting theft or extortion, under such circumstances as should cause such person, agent, employee or representative to make reasonable inquiry to ascertain that the person from whom such property was bought or received had the legal right to sell or deliver it, without making such reasonable inquiry, shall be presumed to have bought or received such property knowing it to have been stolen or obtained. This presumption may, however, be rebutted by proof.

Cal. Pen. Code, § 496, subd. 2 (West Ann. 1988).

Subdivision 2 as it read at the time of the alleged offense considered in *Roder* is identical with its present form except for its reference to swap meet vendors. 33 Cal.3d at 500, n. 9, 658 P.2d at 1307.

proof because it pertained to an element of the offense of receiving stolen property, *i.e.*,, that the defendant knew that the property which he received was stolen, and it, facially considered, lightened the prosecution's burden of proving all elements of the offense beyond a reasonable doubt.[13] 33 Cal.3d at 499-5023, 658 P.2d at 1307-1309.

However, the *Roder* Court proceeded to construe the offending statute as authorizing only a permissive inference in order to save its constitutionality. 33 Cal.3d at 505-507, 658 P.2d at 1311-1313. The *Roder* Court did more than simply construe Penal Code section 496 as embodying only a permissive presumption. That Court declared:

> The Attorney General reasons that because the holdings in *Ulster County* and *Sandstrom* are applications of the constitutional reasonable doubt rule, under Evidence Code section 501 the principles embodied in those decisions should be read into all California statutes - like section 496 - which through the use of presumptions or similar devices assign the burden of proof in a criminal action.

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13. Evidence Code section 605 defines a presumption affecting the burden of proof as "a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others." Cal. Evid. Code, § 605 (West Ann. Supp. 1989). Evidence Code section 603 defines a presumption affecting the burden of producing evidence as "a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." Cal. Evid. Code, § 603 (West Ann. 1966). According to Evidence Code section 520, "[t]he party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." Cal. Evid. Code, § 520 (West Ann. 1966).

> Although the Attorney General's suggestion may require some creative statutory construction and the careful framing of jury instructions, we believe that the proposal is basically sound. Under Evidence Code section 501, any statute which assigns the burden of proof in a criminal case is made subject to the overriding rule that the prosecution bears the burden of proving guilt beyond a reasonable doubt. Before *Ulster County* and *Sandstrom*, it was not clear how that principle affected presumptions in criminal cases, but now that the Supreme Court has - at least in part - clarified the constitutional limits on the use of such presumptions, it appears more in keeping with the overall legislative intent for courts to pare down existing statutory presumptions to constitutionally permissible limits, rather than to abrogate them altogether.

33 Cal.3d at 505-506, 658 P.2d at 1312.[14]

Given the concern of the *Roder* Court with saving the constitutionality of California statutory presumptions, *Roder* must also be understood as declaring a judicial policy that any mandatory presumptions, including those characterized as affecting the burden of production of evidence, which lighten the prosecution's burden of proving beyond a reasonable doubt

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14. Evidence Code section 501 provides: "Insofar any statute, except Section 522, assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096." Cal. Evid. Code, § 501 (West Ann. 1966). Evidence Code section 522 pertains to the claim of insanity. Penal Code section 1096 provides in part that "[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt." The rest of section 1096 defines "reasonable doubt." Cal. Pen. Code, § 1096 (West Ann. 1985).

an element of the offense charged, must be so construed as to save their constitutionality in criminal cases.

Roder declares that mandatory presumptions affecting the burden of proof which lessen the prosecution's burden of proof beyond a reasonable doubt as to an element of the offense are to be construed as only authorizing permissive inferences. 33 Cal.3d at 506, 658 P.2d at 1312. *Roder* does not expressly extend the same rule to similar presumptions affecting the burden of producing evidence, such as those embodied in §§ 484, subd. (b) and 10855. Our research does not disclose any California appellate court decision which expressly extends the *Roder* rule to mandatory presumptions affecting the burden of producing evidence.[15]

As we have seen, the court below failed to construe §§ 484, subd. (b) and 10855 in such a manner as to save their constitutionality. That court evidently understood California law as not requiring that, with respect to a statutory presumptions affecting the burden of producing evidence with respect to elements of offenses, the jurors be appropriately instructed as to the effect of the presumption.[16] The court below thus failed to conform to the policy established in *Roder* that "it appears more in keeping with the overall legislative intent for courts to pare down existing statutory presumptions

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15. In *In re Feiock*, 180 Cal.App.3d 649, 225 Cal.Rptr. 748 (Cal.Ct.App. 1986), the California Court of Appeal applied the *Roder* rule to California Code of Civil Procedure section 1209.5 (presumption of contempt based on nonpayment of court-ordered support), but characterized the statutory presumption as one affecting the burden of proof. This Court vacated and remanded, *sub. nom. Hicks* v. *Feiock*, 484 U.S.___, 108 S. Ct. 1423 (1988) so that the state court could determine whether the contempt was civil or criminal.

16. This requirement is necessary in order to save the constitutionality of the presumption as one affecting the burden of producing evidence. However, this requirement may not be sufficient since the validity of such presumptions is an open question according to *Francis* v. *Franklin*.

to constitutionally permissible limits, rather than to abrogate them altogether." 33 Cal.3d at 506, 658 P.2d at 1312.

Clearly one way in which the constitutionality of §§ 484, subd. (b) and 10855 can be saved is for the California courts to construe them as authorizing permissive inferences. The prosecution would be entitled to an instruction with respect to such permissive inferences in an otherwise appropriate case "unless and until some evidence is introduced which would support a finding of [the ultimate fact's] nonexistence." Cal. Evid. Code, § 604 (West Ann. 1966); *People* v. *Hemmer, supra,* 19 Cal.App.3d at 1061.

Another way to save the constitutionality of §§ 484, subd. (b) and 10855 is to treat them as "permissive" statutory presumptions affecting the burden of producing evidence. The statutes would thus be construed to authorize permissive inferences but the jury would also be instructed that they are not authorized to find the ultimate fact from the predicate fact if there was some evidence introduced which would support a finding of the nonexistence of the ultimate fact. As with a permissive inference, the prosecution would not be entitled to the instruction if the trial court made a preliminary determination that some evidence was introduced which would support a finding of the nonexistence of the ultimate fact.

Although the validity of a mandatory presumption affecting the burden of producing evidence, which lessens the prosecution's burden of proof with respect to an element of the offense, is an open constitutional question, California appellate courts may nevertheless opt to construe a statute defining a mandatory presumption affecting a burden of production of evidence by simply requiring that the jury be instructed about the effect of the presumption. In that case, it is arguable that the quasi-permissive inference authorized by

the statute as thus construed is consistent with due process of law.[17]

Obviously, we are in no position to predict how California appellate courts, including the court below, would construe §§ 484, subd. (b) and 10855 in order to save their constitutionality. We can only be certain that these courts, in order to conform with the policy established in *Roder*, must construe these statutes in order to save their constitutionality.

C

THE IMPLICIT CONSTRUCTION OF THE COURT BELOW OF §§ 484, SUBD. (B) AND 10855, DEFINING MANDATORY PRESUMPTIONS AFFECTING THE BURDEN OF PRODUCING EVIDENCE WITHOUT REQUIRING JURY INSTRUCTION AS TO THE EFFECT OF THE PRESUMPTION, IS NOT AN AUTHORITATIVE STATEMENT OF CALIFORNIA LAW

Since the court below found no instructional error based upon §§ 484, subd. (b) and 10855, it implicitly construed these statutes as defining mandatory presumptions affecting the burden of production of evidence without the requirement of a jury instruction as to the effect of the presumption. As we shall show, that construction is not an authoritative statement of California law.

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17. California appellate courts might well decide that any statute defining a mandatory presumption affecting the burden of production of evidence which lessens the prosecution's burden of proof as to an element of a crime should be construed as authorizing a permissive inference, rather than risking a determination by this Court that such mandatory presumptions offend due process of law even though the jurors are to be instructed as to the effects of the presumption.

It should be noted that: First, the opinion of the court below was not published. Second, because it was not published, it may not be cited as precedent.[18] Third, discretionary review by the state intermediate appellate court is possible only if either (a) the appellate department of the superior court certifies that a case be transferred or (b) the opinion of the lower court is published or to be published.[19]

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18. Rule 977, California Rules of Court, provides in pertinent part:

(a) An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

Cal. Civ. & Crim. Rules (West Ann. Supp. 1989).

19. Rule 62, California Rules of Court, provides in pertinent part:

(a) A Court of Appeal may order a case transferred to it for hearing and decision when the superior court certifies or the Court of Appeal on its own motion determines from an opinion of the appellate department published or to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

Cal. Civ. & Crim. Rules (West Ann. Supp. 1989).

Rule 63, California Rules of Court, provides in pertinent part:

(a) The superior court on application of a party or on its own motion may certify that the transfer of a case to the Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. . . .

(continued...)

Since neither condition was applicable, the case could not be transferred to the Court of Appeal, the intermediate appellate court in California. Fourth, discretionary review by the California Supreme Court of a judgment of the appellate department of the superior court is not possible unless the case has been ordered transferred to the Court of Appeal.[20]

We are mindful that the ordinary rule is that this Court takes the law of a particular state as that provided by the state appellate court's resolution in the case under review. *Hick* v.

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19. (...continued)

Cal. Civ. & Crim. Rules (West Ann. 1981).

20. Rule 27.5, California Rules of Court, provides in pertinent part:

> (a) On its own motion or on petition of a party, the Supreme Court may order a cause pending in a Court of Appeal transferred to itself. For purposes of this rule, a cause is pending until the decision of the Court of Appeal is final as to that court; a cause decided by the appellate department of a superior court is not pending in a Court of Appeal until it is ordered transferred pursuant to rule 62.

Cal. Civ. & Crim. Rules (West Ann. Supp. 1989).

Rule 28 provides in pertinent part:

> b) A party seeking review [in the Supreme Court] must serve and file a petition within 10 days after the decision of the Court of Appeal becomes final as to that court, but a petition may not be filed after denial of a transfer to a Court of Appeal in a case within the original jurisdiction of a municipal or justice court....

Cal. Civ. & Crim. Rules (West Ann. Supp. 1989).

Refusal by a Court of Appeal ordinarily terminates appellate review of a municipal court case. Extraordinary relief has been permitted, not to review error of the appellate department of the superior court, but when it exceeds it jurisdiction, such as refusing to follow precedent. *Dvorin* v. *Appellate Department*, 15 Cal.3d 648, 650, 125 Cal.Rptr. 771, 542 P.2d 1363, 1364 (Cal. 1975).

Feiock, supra, 108 S. Ct. at 1428. Such resolution may not be "disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Id.*, 108 S. Ct. at 1428 n. 3.

The implicit construction by the court below of §§ 484, subd. (b) and 10855 may be properly disregarded because, in view of the policy established in *Roder*, we have the necessary "persuasive date that the highest court of the state would decide otherwise."

The statutes under review, must be construed according to the principle announced in *People* v. *Roder* in order to save their constitutionality. If so construed, we still must determine whether such construction would conform to the due process of law requirement that the ultimate fact in each statute is more likely than not to flow from the basic facts proved. However, before making this determination, we must first address the issue whether embezzlement includes the intent to permanently deprive the owner of his property as an element of that offense.

II

UNDER CALIFORNIA LAW, THE OFFENSE OF EMBEZZLEMENT DOES NOT INCLUDE THE INTENT TO PERMANENTLY DEPRIVE THE OWNER OF HIS PROPERTY AS AN ELEMENT

Appellant states that under California law the crime of grand theft auto, in violation of Penal Code section 487, subdivision 3, "has long been interpreted to require a specific intent to 'deprive the owner of the automobile permanently.' *People* v. *Pater*, 267 Cal.App.2d 921, 73 Cal.Rptr. 823, 825 ([Cal.Ct.App.] 1969)." Brief of Appellant, 3. Appellant surely cannot be blamed for making this statement, given *Pater* and

the fact that the jury received the standard instruction, which is used when a defendant is charged both with grand theft auto (Pen. Code, § 484, subd.(a)) and unlawful taking/driving (Veh. Code, § 10851), and which specifies that theft requires the specific intent to permanently deprive the owner of his property.[21] We shall proceed to show, however, that theft encompasses the crime of embezzlement which, under California law, does not include the intent to permanently deprive the owner of his property among its elements.

The crime of theft, as defined in Penal Code section 484[22] consolidates the crimes of theft by larceny (including larceny by trick and device), by false pretenses, and by embezzlement.[23] However, this statutory consolidation does not change the elements of the component offenses. *People* v. *Ashley*, 42 Cal.2d 246, 258, 267 P.2d 271, 279 (Cal. 1954). As the *Ashley*

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21. JA 8. CALJIC 14.35, also given to the jury, is to the same effect. JA 6. Both instructions (CALJIC 14.35 and 14.37) are approved by the Committee on Standard Jury Instructions, of the Superior Court of Los Angeles County, California. They are now contained in 2 CALIFORNIA JURY INSTRUCTIONS - CRIMINAL (5th Ed. 1988) 155, 159-161.

22. This statute provides in pertinent part:

> (a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

Cal. Pen. Code, § 484, subd. (a) (West Ann. 1988).

23. Appellant was charged with grand theft auto in count 1 of the complaint. JA 3. Grand theft is defined by Penal Code section 487 as "theft committed in any of the following cases: . . . . 3. When the property taken is an automobile. . ." Cal. Pen. Code, § 487 (West Ann. 1988).

court explained: "Larceny by trick and device is the appropriation of property, the possession of which was fraudulently acquired; obtaining property by false pretenses is the fraudulent or deceitful acquisition of both title and possession."[24] *Ibid.* There is no larceny without an intent to steal, *i.e.*, the intent to appropriate property of another and permanently deprive him of its possession. 2 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW (2d ed. 1988) §584, p. 660. There is no larceny by trick and device when the defendant obtains possession by fraud or trickery unless he has an intent to steal at the time of the taking. *Id.*, § 585, pp. 660-661; *People* v. *Salorse*, 62 Cal. 139, 141-142 (Cal. 1882); *People* v. *Jackson*, 138 Cal. 462, 464, 71 P. 566, 567 (Cal. 1903).

On the other hand, the California crime of embezzlement does not include the intent to steal as an element. Penal Code section 503 defines "embezzlement" as "the fraudulent appropriation of property by a person to whom it has been entrusted." Cal. Pen. Code, § 503 (West Ann. 1988). Although the crime of embezzlement includes among its elements the specific intent to deprive the owner of his property, the specific intent need not be to deprive the owner *permanently* of possession. This was so held in *People* v. *Jackson*, *supra*, 138 Cal. at 464, where the California Supreme Court found no error in an embezzlement instruction that "the property must have been appropriated and converted to the use of the party to whom it had been intrusted, with the intent, either temporarily or permanently, of depriving the

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24. We need not be concerned with false pretenses since there is no contention that title passed to appellant when he obtained its possession pursuant to the rental agreement. The jury was only instructed as to theft by larceny by trick and device and theft by embezzlement, since there had been no trespassory taking by appellant. JA 6, 10-12.

owner of his property) as an element is well-settled. *People* v. *Talbot*, 220 Cal. 3, 16, 28 P.2d 1057, 1062 (Cal. 1934); *People* v. *McClain*, 140 Cal.App.2d 899, 901, 295 P.2d 952, 953 (Cal.Ct.App. 1956); *People* v. *Britz*, 17 Cal.App.3d 743, 751, 95 Cal.Rptr. 303 (Cal.Ct.App. 1971), *People* v. *Jackson*, 193 Cal.App.3d 393, 401, 238 Cal.Rptr. 327 (Cal.Ct.App. 1987); 2 WITKIN & EPSTEIN, *supra*, §§ 592, 597, pp. 668, 673. Indeed, it is expressly specified by statute that an intent to restore the property embezzled is no ground of defense. Cal. Pen. Code, § 512 (West Ann. 1988).

The doctrine of *People* v. *Pater, supra,* that theft requires an intent to steal, was erroneously fashioned, doubtless because the underlying facts involved a trespassory taking of an automobile. The *Pater* doctrine was simply ignored in the subsequently decided embezzlement cases of *Britz* and *Jackson*, both of which are in accord with the earlier California Supreme Court decision of *People* v. *Talbot, supra*. *Pater* should therefore not be considered as authoritative. Needless to say, the California Court of Appeal is without authority to overrule a doctrine established by the California Supreme Court. *Auto Equity Sales* v. *Superior Court*, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937, 939-940 (Cal. 1962).

In the instant case, the jury was instructed that theft includes embezzlement, and that embezzlement includes the element: "That with the specific intent to deprive the other person of his property, the person fraudulently appropriated or converted it to his own use or purpose." JA 10, 12. The jury was not expressly instructed that embezzlement does not include the intent to permanently deprive the owner of his property. Indeed, the giving of CALJIC 14.35 and 14.37 (JA 6, 8) would, in all likelihood, be taken as meaning that theft

requires an intent to permanently deprive the owner of his property as an element of embezzlement.[25]

Clearly, the trial court committed error insofar as it implicitly instructed the jury that theft requires an intent to permanently deprive the owner of his property. However, we see nothing in the opinion of the court below that it endorsed the doctrine that embezzlement requires an intent to steal. JA 60-62.

Although in the instant case the jury was instructed that grand theft auto requires the intent to permanently deprive the owner of his property (JA 6, 8), such error must be deemed harmless since the jury must have necessarily found the lesser intent to temporarily deprive the owner of its property. To paraphrase *Killian* v. *United States*, 368 U.S. 231, 258 (1961), "it is evident that the erroneous [instruction] could not have prejudiced [appellant] for it. . . exacted a higher standard of proof of [intent] than the law required."[26]

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25. The instant case emphasizes the need for CALJIC 14.35 and 14.37 (JA 6, 8) to be revised so that it is consistent with the doctrine that embezzlement does not include an intent to steal.

26. In *Killian*, defendant was convicted of having violated 18 U.S.C. § 1001 by falsely stating, in an affidavit filed with the National Labor Relations Board, that he was not a member of the Communist Party nor affiliated with it. The paraphrased language in the accompanying text is taken from the following:

> Petitioner argues that because the first paragraph of the instruction stated that affiliation "means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party," and the third paragraph of the instruction stated that "affiliation . . . means a relationship which is equivalent or equal to that of membership in all but name," it was contradictory and confusing. We agree that the third paragraph appears inconsistent with the first. However, it is evident that the erroneous third paragraph could not have prejudiced petitioner for it, though inconsistent with the correct first paragraph, exacted a higher

(continued...)

California law is similar in effect. In *People* v. *Rodriquez*, 50 Cal.App.3d 389, 123 Cal.Rptr. 185 (Cal.Ct.App. 1975), the California Court of Appeal held that the elements of the crime of possession of a deadly weapon in county jail, proscribed by California Penal Code section 4574, did not include the specific intent of violent use. The *Rodriquez* court further stated:

> Defendant contends the jury was improperly instructed in regard to his intended use of the razor blade. In fact, however, the jury was instructed, at defendant's request, that the People had to demonstrate beyond a reasonable doubt that the intended use of the razor blade was dangerous rather than harmless. This instruction was error. However, the error was vastly in the favor of defendant. It certainly does not justify reversal.

50 Cal.App.3d at 397. Fn. omitted. Clearly any instructional error concerning intent to permanently deprive the owner of his property was harmless in the instant case since embezzlement does not include that intent among its elements.

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26. (...continued)
standard of proof of affiliation than the law required.

368 U.S. at 257-258.

III

THE PERMISSIVE OR QUASI-INFERENCE AUTHORIZED BY EITHER STATUTE IN QUESTION, AS PROPERLY CONSTRUED, IS FACTUALLY JUSTIFIED[27]

The test pertaining to the reliability of permissive presumptions is the "more likely than not" standard employed in *Leary* v. *United States*, 395 U.S. 6 (1969) and confirmed in *Ulster County*, 442 U.S. at 166, *i.e.*, whether "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary*, 395 U.S. at 36.

We have thus far shown that §§ 484, subd. (b) and 10855, properly construed in accordance with *People* v. *Roder* in order to save their constitutionality, authorize permissive or quasi-permissive inferences. Moreover, we have shown that embezzlement, a species of theft, does not include an intent to steal. Hence the inference or quasi-inference authorized by § 10855 is factually warranted when the ultimate fact is the intent to temporarily or permanently deprive the owner since that statute expressly pertains to embezzlement only. The same remarks apply *mutatis mutandis* to the inference or

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27. We use the term "quasi-permissive inference" to apply to a mandatory presumption affecting a burden of production of evidence by the defendant, where it is required that the jury be instructed as to the effect of the presumption. Our usage is justified because, as this Court put it in *Ulster County*, 442 U.S. at 157 n. 16: "To the extent that a presumption imposes an extreme low burden of production - *e.g.*, being satisfied by 'any' evidence - it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such." The term "quasi-permissive inference" is used in order not to prejudge, as it were, the issue of the constitutionality of such presumptions.

quasi-inference authorized by § 484, subd. (b), as properly construed, insofar as that statute pertains to embezzlement.[28]

Surely, the inferred fact authorized by § 10855 (*i.e.*, the wilful and unintentional failure to return a leased or rented vehicle to its owner within five days after the lease or rental agreement has expired) is at least more likely than not to flow from the predicate fact -- with the probability of the inference enhanced in the absence of contrary evidence. In *People* v. *Cloward*, 196 Cal.App.2d 669, 672, 16 Cal.Rptr. 772 (Cal.Ct.App. 1961), the Court of Appeal explained:

> Under section 10855 the facts to be proved are that a person has leased or rented a vehicle and that he has *willfully and intentionally* failed to return the vehicle to the owner within five days *after the lease or rental agreement has expired.* "Willfully" means done with a purpose or willingness to commit the act. (Pen. Code, § 7, subd. 1.) "Intentionally" means done with intention of purpose, intended, designed. (*People* v. *McCree*, 128 Cal.App.2d 196, 202 [275 P.2d 95 (Cal.Ct.App. 1924)].) Mere proof of negligent failure to return the vehicle would not raise the presumption. We think it manifest there is a rational connection between the facts proved and the fact presumed. ([Citation].) The presumption is based on past experience and reasonable probabilities.

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28. Appellant's argument about the factual implausibility of the § 10855 "presumption" is based upon the mistaken assumption that embezzlement requires the intent to steal. Without argument, but for proper reasons given his mistaken assumption about embezzlement, appellant contends that the § 484, subd. (b) "presumption" is factually unwarranted. Brief of Appellant, p. 31 n. 28.

Appellant asserts that, with respect to § 10855, the "proof of the predicate fact -- intentional failure to return a car within five days of a rental agreement's expiration -- generates a presumption with respect to *all* of the constituent elements of the offense," *i.e.*, embezzlement. Brief for Appellant, 3. We must agree that appellant is *formally* correct. However, leasing or renting of a vehicle and the transfer of possession to the lessee or renter means that property has been accepted pursuant to a relationship of trust and confidence. Thus proof of the predicate fact itself includes proof of two of the elements of embezzlement: (1) " [a] relation of trust and confidence existed between two persons," and (2) [p]ursuant to such relationship one of those persons accepted property entrusted to [him][her] by the other person." CALJIC 14.07, 2 CALIFORNIA JURY INSTRUCTIONS - CRIMINAL (5th ed. 1988) 129. More succinctly, the two purported elements constitute one: that property has been entrusted by one person to another. Cal. Pen. Code, § 503 (West Ann. 1966); *People* v. *Jackson, supra*, 138 Cal. at 464; *People* v. *Salorse, supra,* 62 Cal. at 142 (held, that the crime of embezzlement took place when the defendant, who had hired a horse and thus become a bailee, thereafter "absconded from the county, taking the horse with him. . . . with the fraudulent intent to appropriate the horse, and to deprive the owner of it"). In other words, proof that property had been entrusted to the defendant, together with the willful and intentional failure to return the leased or rented vehicle within five days after the expiration of the agreement, generates the ultimate fact: that the property had been fraudulently appropriated by defendant, *i.e.*, "[w]ith the specific intent to deprive the other person of [his][her] property, the person appropriated or converted it to [his][her] use or purpose." CALJIC 14.07, *supra*, at 129. See JA 12. Hence appellant's contention, although formally correct, is only diaphanously substantial.

It appears to us that the predicate facts set forth in § 484, subd. (b) (*i.e.*, failure of lessee or renter to return property within twenty days after the owner has made written demand by certified or registered mail following the expiration of the written lease or rental agreement) generate more often than not the presumed (or rather, the inferred) fact specified therein (*i.e.*, the intent to commit theft by fraud) insofar as this embraces the intent to steal. However, assuming *arguendo* that the § 484, subd. (b) "presumption" does not satisfy the "more often than not" test of *Leary-County Ulster* insofar as the fraudulent intent embraces an intent to steal, it nevertheless satisfies the test insofar as the intent to commit theft by fraud embraces the fraudulent intent to temporarily deprive the owner of his property -- since embezzlement is one form of theft by fraud[29].

V

THE CHAPMAN HARMLESS-ERROR TEST CAN PROPERLY APPLY TO THE INSTANT CASE, BUT SHOULD BE APPLIED BY THE COURT BELOW

INTRODUCTION

As we have argued, neither § 484, subd. (b) nor § 10855 violates due process of law if each is construed to authorize a permissive inference. On the other hand, it is an open question whether these statutes violate due process of law if construed so as to authorize that kind of quasi-permissive inference implicit in the concept of a mandatory presumption

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29. It appears that there is insufficient evidence to sustain appellant's conviction of theft based upon the theory of larceny by trick and device. *See People* v. *Jackson*, 138 Cal. 462, 464, 71 P. 566, 567 (Cal. 1903). Clearly, appellant's conviction of grand theft auto can only be warranted upon a theory of embezzlement. It is therefore in this context that the factual warrantability of the § 484, subd. (b) "presumption" is to be judged in the instant case.

affecting the burden of producing evidence -- provided the jury is appropriately instructed about the effect of the presumption.

However, the issue critical to appellant in this case is not the validity of a "presumption" statute as authoritatively construed, but rather how it has been applied to him.[30] The critical question is how the jury was instructed and how a reasonable jury would have understood the instructions. As this Court explained in *Francis* v. *Franklin*: "The federal constitutional question is whether a reasonable juror could have understood [the relevant instructions] as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." 471 U.S. at 316.

We again concede, contrary to the Appellate Department's judgment, that the trial court committed instructional error with respect to the statutory presumptions.[31] Clearly, both instructions could reasonably be taken as directing the jury to find the presumed fact upon proof of the predicate facts. They were not told in substance that the presumed fact would be discharged upon the introduction of evidence to the contrary. They were not told that they may, but were not required, to infer the ultimate fact if the basic facts were proved. JA 15. Other instructions did not cure the instructional error.

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30. The discussion which follows assumes that §§ 484, subd. (b) and 10855 are deemed as having been so construed by California appellate courts as to conform with due process of law.

31. We conceded the point in our Respondent's Brief, at p. 5, and in our Motion of Appellee to Dismiss, at p. 10, filed with this Court.

The next question is, therefore, whether the beyond-the-reasonable-doubt harmless-error test of *Chapman* v. *California*, 386 U.S. 18 (1967) can apply to the instant case. The next question, assuming the test can apply, is whether this Court should undertake the application of the test to the instant case. And, finally, assuming the test is applied, what is the result.

A

THERE IS NO IMPEDIMENT TO THE USE OF THE *CHAPMAN* HARMLESS-ERROR TEST TO THE INSTANT CASE

Appellant contends that the *Chapman* harmless-error test cannot be properly applied to the instant case. He argues that, unlike mandatory rebuttable presumptions, an instruction that directs a conclusive presumption on an element of the offense can never be harmless. Brief of Appellant, 11, 36-38.

Appellant, we submit, has egregiously misunderstood this Court's opinion in *Rose* v. *Clark*, 478 U.S. 570 (1986). In that case, this Court considered the question of whether the harmless-error standard of *Chapman* v. *California* applies to jury instructions that violate the principles of *Sandstrom* and *Francis*, and held that it did. Although *Rose* v. *Clark* involved an instruction embodying a mandatory rebuttable presumption, there can be no doubt that the holding pertains equally to mandatory conclusive presumptions. It should be noted that *Sandstrom* involved a mandatory conclusive presumption. Yet, this Court in *Rose* declared: "Nor is *Sandstrom* error equivalent to a directed verdict for the State." 478 U.S. at 580. Thus appellant errs when he claims in his brief that this Court deems a mandatory conclusive presumption pertaining to

elements of an offense to be the equivalent of a directed verdict. Brief of Respondent, 36. As this Court has further explained in *Pope* v. *Illinois*, 481 U.S. 497, 504 n. 7 (1987): "To the extent that cases prior to *Rose* may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof. . . , after *Rose*, they are no longer good authority."

Contrary to appellant's assertion (Brief of Appellant, 38 n. 36), California applies the *Chapman* test, instead of a reversal-per-se standard, to instructional errors which impermissibly lessen the burden of the prosecution to prove each element of the crime beyond a reasonable doubt. *People* v. *Dyer*, 45 Cal.3d 26, 62-64, 246 Cal.Rptr. 209, 753 P.2d 1, 20-23 (Cal. 1988).[32]

B

THE COURT BELOW SHOULD APPLY THE HARMLESS-ERROR TEST IN THE FIRST INSTANCE

Since the *Chapman* harmless-error test is properly applicable to the instant case, should this Court itself determine whether or not the test is satisfied, or should the case be remanded so that the Appellate Department should undertake that task?

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32. Earlier, in *People* v. *Lee*, 43 Cal.3d 666, 670-676, 238 Cal.Rptr. 406, 738 P.2d 752, 755-758 (Cal. 1987), the California Supreme Court had intimated that the *Chapman* harmless-error test would apply to California cases instead of the reversal-per-se standard. The *Chapman* test had been previously applied in *People* v. *Milham*, 159 Cal.App.3d 487, 505, 205 Cal.Rptr. 688 (Cal.Ct.App. 1984) and *People* v. *Banks*, 147 Cal.App.3d 360, 368, 195 Cal.Rptr. 101 (Cal.Ct.App. 1983) to instructions concerning presumptions pertaining to elements of an offense.

We, of course, recognize that this Court has declared:

> Although we "plainly have the authority" to decide whether, on the facts of a particular case, a constitutional error was harmless under the *Chapman* standard, we "do so sparingly."

Rose v. *Clark*, *supra*, 478 U.S. at 584. We urged the court below to undertake that analysis, but that court declined the task having concluded that there was no instructional error pertaining to the presumptions. In our Motion to Dismiss Appeal, filed in this Court, we urged this Court to find the instructional error harmless beyond a reasonable doubt. However, after further reflection, we can no longer in good conscience hold that it is appropriate for this Court to make the *Chapman* analysis in the first instance.

The reasons for our change-of-mind are as follows. Of course, we are mindful that as a matter of judicial economy as well as deference for state courts, this Court is understandably reluctant to make a harmless-error inquiry when the same has not been done by the state appellate court. However, we urged in our Motion of Appellee to Dismiss that "it is evident that [the court below] would have concluded that the *Chapman* test was satisfied, assuming instructional error concerning the statutory presumptions in question." Motion of Appellee to Dismiss, 10. One important reason was our belief that the court below "concluded that 'defendant never offered testimony concerning the nonexistence of the presumed facts stated in Penal Code section 484 subdivision (b) and Vehicle Cope section 10855." *Ibid.* As appellant accurately points out, the court below did not expressly "consider or reject the possibility that the *State's* witnesses provided evidence supporting 'the non-existence of the presumed facts.'" Brief of Appellant, 29 n. 27. Appellant urges that "one aspect of the State's evidence [*i.e.*, the location

of the rental car when it was recovered] was inconsistent with an intent to keep the car permanently." *Id.* at 39.[33]

We *think* that the court below intended to mean that no evidence was introduced which supported the nonexistence of the presumed facts. We *think* that this is the case because, assuming *arguendo* that the location of the car when it was recovered tends to support the nonexistence of an intent to steal, it does not tend to support the nonexistence of an intent to temporarily deprive a person of his property. However, candor compels us to acknowledge that we cannot be sure of the intention of the court below as to what it meant when it said that "defendant never offered testimony concerning the nonexistence of the presumed facts."

Another reason why we think it more appropriate for the harmless-error testing to be undertaken first by the court below is because this Court, were it to undertake this task, might eventually decide that a conclusion could not be properly reached without augmenting the record on appeal by including at least a partial reporter's transcript.[34] It is obviously not in the interest of judicial economy for this Court to initiate an analysis which might well have to be aborted.

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33. According to the settled statement on appeal, "[t]he automobile was recovered the same day in the parking lot adjoining appellant's business address." JA 37. However, appellant states in his brief that "it was undisputed that the car was found at the local business address provided by appellant at the time he executed the contract." Brief of Appellant, 39.

34. Since our letter of January 22, 1989, addressed to Chief Deputy Clerk Francis J. Lorson, we have not undertaken to make further inquiry as to whether obtaining the reporter's transcript will be possible because we were informed that Appellant's counsel would proceed with the appeal notwithstanding the absence of the transcript. We cannot, therefore, now advise the Court as to whether an effort to obtain a whole or partial reporter's transcript will be successful.

Of course, yet another reason why this Court may judge that it would be inappropriate for it to undertake a harmless-error review at this time is that its members do not share our views with the same confidence we do as to what is the law of the State of California concerning the requisite intent in embezzlement, whether all mandatory presumptions relating to elements of an offense are to be deemed as permissive or quasi-permissive inferences, and so forth.

Appellant's argument that the instructional errors pertaining to the "presumptions" are not harmless beyond a reasonable doubt is based upon the assumption that the dispositive issue is the intent to steal. Brief of Appellant, 11-12, 38-41. We have shown that this assumption is egregiously erroneous, however understandable. Our view is that even on the present record, the instructional error is harmless beyond a reasonable doubt. Since, however, we now believe that the court below should make the harmless-error inquiry in the first instance, it is unnecessary for us to argue the matter further here.

CONCLUSION

Little did we anticipate that this case, resulting in an unreported opinion having no precedential value under California law, would be considered by this Court as one of the last cases of mandatory appeals in instances where state courts sustain the federal constitutional validity of state statutes. But here we are.

This Court, having noted probable jurisdiction with respect to the questions presented in the Jurisdictional Statement pertaining to the statutory presumptions, might quite simply reverse the judgment and remand the case for a harmless-error analysis by the court below. However, as we see it, the Court must determine whether the *Chapman* harmless-error test is

applicable to the kind of instructional error involved in this case. In order to do so, it must consider what is the relevant law of California with respect to embezzlement and purported statutory presumptions. Of course, we have a keen interest in the continued viability of subdivision (a) of Penal Code section 484 and Vehicle Code section 10855, as we understand them. We are anxious, therefore, that nothing appears in the Court's opinion which would undermine the ability of California courts to construe these statutes so as to uphold their constitutionality.

In view of all the foregoing, we submit that the judgment should be reversed and the case remanded to the court below for a determination whether the *Chapman* harmless-error test is satisfied after applying state and federal law so as to uphold the validity of the California statutes now under attack.

Respectfully submitted,

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FOR ARGUMENT

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No. 87-6997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE JOHN CARELLA,

Appellant,

v.

STATE OF CALIFORNIA,

Appellee.

On Appeal From The Appellate Department
Of The Superior Court Of California,
County Of Los Angeles

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

Although urging the Court to spare the challenged statutes from facial invalidation, appellee candidly acknowledges that the instructions given to appellant's jury deprived him of due process of law. On that basis, appellee concedes that the judgment below must be reversed and requests that that case be remanded for a determination of whether the error was harmless. Brief of Appellee at 31 & 37.

The State's confession of error substantially narrows the focus of this appeal. As we explain in the sections that

follow, we continue to believe that Cal. Penal Code § 484 (b) and Cal. Vehicle Code § 10855, as authoritatively construed by the courts below, are unconstitutional in all their applications. We acknowledge, however, that the State's concession makes it unnecessary for the Court to address those broader issues. In light of that concession, the only remaining questions are whether the conceded constitutional violation is subject to harmless error analysis and, if so, whether that inquiry should be undertaken in the first instance by the court below. Although appellant does not oppose the State's request for a remand on the harmless-error issues, he continues to believe that the considerations that ordinarily militate in favor of a remand are largely absent in the circumstances of this case. *See* Brief of Appellant (hereinafter "Opening Br.") at 38 n.37.

I. BECAUSE THE TRIAL COURT'S INSTRUCTIONS PURSUANT TO VEHICLE CODE § 10855 AND PENAL CODE § 484(b) COULD HAVE BEEN REASONABLY CONSTRUED AS DIRECTING A CONCLUSIVE PRESUMPTION ON ONE OR MORE ELEMENTS OF THE OFFENSE, APPELLANT WAS DENIED DUE PROCESS OF LAW.

As appellee is "compelled to concede," the trial court's instructions pursuant to Vehicle Code § 10855 and Penal Code § 484(b) could have been reasonably understood by appellant's jury as directing a mandatory conclusive presumption on one or more elements of the charged offense. Br. of Appellee at 10. *See also id.* at 31 ("[B]oth instructions could reasonably be taken as directing the jury to find the presumed fact upon proof of the predicate facts.") Regardless of how the presumptions are characterized under State law, appellee therefore acknowledges, the manner in which they were presented "offend due process of law." *Id.* at 4. *See also, Sandstrom* v. *Montana*, 442

U.S. 510, 516-17 (1979). Because, as appellee has also conceded, "other instructions did not cure the error," the judgment below must be reversed. Br. of Appellee at 31.[1]

II. ALTHOUGH THE COURT NEED NOT ADDRESS THE ISSUE, APPELLEE'S DEFENSE OF THE FACIAL VALIDITY OF THE STATUTORY PRESUMPTIONS IS WITHOUT MERIT.

Because appellee's concession pretermits any need to consider the facial validity of Vehicle Code § 10855 and Penal Code § 484(b), we address that issue only briefly. Notwithstanding the clarity of the statutory language and the contrary construction of the courts below, appellee contends *first* that both provisions should be interpreted as authorizing a permissive inference rather than a concededly invalid mandatory presumption. *Sec-*

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[1] Disagreeing with appellee, *Amicus Curiae* American Rental Association attempts to defend the instructions on several grounds, all of which are unavailing. The suggestion that a general "reasonable doubt" instruction cures a *Sandstrom* violation has been specifically rejected by the Court on two separate occasions. Opening Br. at 14 n.14. Nor is it of any significance whatever that the trial court included a "mistake of fact" instruction in its charge. Self evidently, telling the jury that a mistake of fact would vitiate intent does not excuse an instruction that directs the jury to conclusively presume intent in the first place. (It is, of course, entirely possible to lack the requisite intent for grand theft even if one is not operating under a mistake of fact). Moreover, § 10855 generates a presumption with respect to *every* element of the offense. Thus, even assuming that intent remained a triable issue in light of the mistake of fact instruction, that conclusion would not save the statute. Finally, the suggestion that a presumption is impermissible only if proof of the *actus reus* generates an inference of *mens rea* is wholly inconsistent with the Court's reasoning in *Sandstrom* and *Francis*. In any event, because § 10855 operates in precisely that fashion, the distinction *Amicus* purports to be drawing is ephemeral.

ond, although recognizing (1) that appellant's jury was repeatedly instructed that embezzlement requires a specific intent to deprive the owner of permanent possession, (2) that the California pattern jury instructions, which were reissued as recently as 1988, endorse that interpretation of state law, and (3) that that interpretation is reflected in California decisional law, appellee relies on another line of cases to suggest that an intent to deprive the owner of temporary possession is sufficient to sustain a conviction for embezzlement. On that basis, it contends that the relationship between the predicate and elemental facts set out in the challenged presumptions are sufficiently rational to satisfy Due Process. Neither of appellee's contentions withstands even the most minimal scrutiny.

A. For Purposes Of This Appeal, The Decision Below Represents The Authoritative Interpretation Of State Law.

Appellee concedes that, as construed by the courts below, the challenged presumptions are unconstitutional on their face. Br. of Appellee at 10 & 16.[2] Notwithstand-

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[2] According to appellee, the defect in the statutes, as construed by the lower courts, is that the jury is never informed of the mechanics of the presumption—*i.e.*, that it drops out of the case if the jury finds some evidence in support of the non-existence of the presumed fact. If the trial judge makes that determination unilaterally—without ever instructing the jury that the presumption is "discharged" upon the introduction of some contrary evidence—appellee concedes that the scheme violates the rule of *Sandstrom* v. *Montana*, *supra*. Br. of Appellee at 10. Appellee further recognizes that the constitutionality of a presumption that shifts the burden of production is "an open question" even if the jury itself determines whether sufficient evidence has been adduced to cause the presumption to disappear from the case. *Id.* at 12. As is discussed in our opening brief at pp. 17-30, we believe that the burden shifting presumptions at issue in this appeal are unconstitutional regardless of whether the jury is informed of the mechanics of the procedural device.

ing that concession, appellee suggests that the statutes should be upheld in light of another California decision, which suggests that impermissible mandatory presumptions should be "converted" into permissive inferences in order to assure their constitutionality. Br. of Appellee at 14-17. *See People* v. *Roder*, 33 Cal.3d 491, 658 P.2d 1302 (1983). Because, in appellee's view, the California Supreme Court would "pare down" the challenged statutes "to constitutionally permissible limits," the contrary interpretation by the court below should not be the basis for invalidating either provision. 33 Cal.3d at 505-06, 658 P.2d at 1312.

The suggestion that this Court should, in effect, disregard the lower court's construction of state law is untenable. As the Court reaffirmed as recently as last term, even when the decision under review is that of an intermediate appellate court, this Court is simply "not at liberty" to depart from a state court's "considered judgment" concerning the meaning of State law. *Hicks ex rel. Feiock* v. *Feiock*, 108 S.Ct. 1423, 1428 & 1428 n.3 (1988) (quoting *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223, 237-38 (1940)). Invocation of that unvarying rule is particularly appropriate in the circumstances of this case.[3] Because the decision in *Roder* involved neither of the statutory provisions at issue in this appeal, the opinion's observation about the status of mandatory presumptions generally was the purest form of dictum. Thus, "[e]ven though it is arguable that the Supreme Court of [California] will at some later time modify the rule of [this] case,

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[3] In diversity cases, federal courts will occasionally speculate about how the highest appellate court in the state would resolve an open issue of state law. But appellee cites no federal-question cases, and we have found none, in which this Court second guessed an interpretation of state law by an intermediate state court.

whether that will ever happen remains a matter of conjecture." *Id.* at 1428 n.3. In that circumstance, as the Court again admonished in *Hicks*, the law of the intermediate appellate court must be accepted as authoritative.

In short, for purposes of this appeal, the law of California is the law that was announced and applied in the courts below. As we argue in our opening brief—and as appellee now concedes—Penal Code § 484(b) and Vehicle Code § 10855, as authoritatively construed by both the trial court and the Appellate Department, "offend due process of law." Br. of Appellee at 4.

B. The Absence Of A Rational Connection Between The Predicate And Presumed Facts Renders Vehicle Code § 10855 Independently Unconstitutional.

For similar reasons, appellee's defense of the rationality of the challenged presumptions is unavailing. Effectively conceding the point, the State makes no effort to defend the proposition that willful retention of a rental car five days beyond the due date "more likely than not" implies an intent to keep it *permanently*. *Leary* v. *United States*, 395 U.S. 6, 36 (1969). Unable to make that argument, it contends instead that the trial court "committed error" when it instructed the jury that all forms of grand theft, including embezzlement, require a specific intent to deprive the owner of permanent possession. Br. of Appellee at 25. Since embezzlement only requires an intent to keep the property temporarily, it suggests, the connection between the predicate and presumed facts set out in § 10855 is sufficiently rational to satisfy due process.

Appellee's argument, once again, reduces to the suggestion that the decision below should not be judged on its

own terms because it represents a misapplication of state law. Not once, but *four* times, the trial court instructed the jury that "the crime of grand theft"—which, the jury was further charged, subsumes the crime of embezzlement—requires "a specific intent to permanently deprive the owner of his property." J.A. 8; *see also*, J.A. 6 & 10. Those instructions were taken from California's pattern jury instructions, which are approved by an official committee of the Superior Court and are intended to accurately represent the current state of the law in California. Presumably for that reason, the court's charge elicited no objection from the prosecution, either at trial or on appeal.[4] In these circumstances, it is simply not open to appellee to now urge an interpretation of state law diametrically at odds with that of the lower courts. *See infra* pp. 5-6.

Moreover, while appellant recognizes that it is not the province of this Court to delve into the nuances of California law, the interpretation now advanced by the State is nowhere near as unambiguous as it suggests. Appellee correctly identifies a line of cases holding that an otherwise valid conviction for embezzlement will be sustained even if the defendant intended to restore the converted funds at some unspecified future date. At the same time, numerous other decisions hold unequivocally that "[i]f it appears that property has been taken with the intent to make but a temporary . . . use of the property, then a conviction of grand theft may not occur." *People* v. *Renteria*, 60 Cal. App. 2d 463, 141 P.2d 37, 42 (2d Dist.

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[4] See Br. of Appellee at 22 n.21 & 25 n.25 (suggesting that the pattern jury instructions should be "revised" by the official committee that reviews them in order to reflect the view of the law now advanced by appellee).

1943).[5] That generic requirement, an equal number of decisions suggest, holds true regardless of the form of theft alleged in the complaint. *See, e.g.*, *People* v. *Pater*, 267 Cal. App.2d 921, 73 Cal. Rptr. 823, 825 (3d Dist. 1969) (embezzlement requires intent to permanently deprive owner of property); *People* v. *Starkey*, 234 Cal App.2d 822, 44 Cal. Rptr. 738, 742 (2d Dist. 1965) (assuming same in rental car case); *People* v. *Carr*, 229 Cal. App.2d 74, 40 Cal.Rptr. 58, 61 (2d Dist. 1964) (same); *People* v. *Clouard*, 196 Cal. App.2d 669, 16 Cal. Rptr. 772, 776 (2d Dist. 1961) (same). Indeed, the very purpose of enacting an omnibus theft statute, the California Supreme Court has declared, is to eliminate the need for the jury to consider "the technical differences between the several types of theft" it subsumes. *People* v. *Ashley*, 42 Cal.2d 246, 258, 267 P.2d 271, 279, *cert. denied*, 348 U.S. 900 (1954).

It is also noteworthy that none of the cases relied on by appellant involved either motor vehicles or a simultaneous charge under Cal. Vehicle Code § 10851, which, by its terms, authorizes conviction even if the defendant intended only a temporary retention of an automobile. To the contrary, because of the substantial overlap between Penal Code § 484 (theft) and Vehicle Code § 10851, California courts in motor vehicle cases are especially careful to instruct the jury that grand theft, in all its forms, requires an intent to deprive the owner of permanent possession. *See, e.g.*, *People* v. *Pater*, *supra*. *See also*, *People* v. *Carr*, *supra*; *People* v. *Jeffries*, 47 Cal. App.2d

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[5] *See also People* v. *Jaso*, 4 Cal. App.3d 767, 771, 84 Cal. Rptr. 567, 570 (2d Dist. 1970) ("That the intent to permanently deprive an owner of his property is a necessary requisite of the crime of theft cannot be doubted.")

801, 119 P.2d 190, 194 (1941). The reason for this apparently uniform approach is well illustrated by the circumstances of this case. Under the interpretation advanced by the State, the criminal complaint filed against appellant—which charged both grand theft and a violation of Vehicle Code § 10851—would be entirely duplicative. If the prosecution could secure a conviction for embezzlement upon proof of an intent to keep the car "temporarily," the elements of the two offenses become functionally identical, a consequence that could not have been intended by the legislature.

In sum, appellee can only defend the rationality of Vehicle Code § 10855 by challenging the lower courts' interpretation of state substantive law. In order to meet that argument, it is sufficient merely to invoke this Court's oft-repeated admonition that it is not "free . . . to overturn [a] state court's conclusions of state law." *Hicks ex rel. Feiock* v. *Feiock*, *supra*, 108 S.Ct. at 1428. In light of the uncertain state of California law, the clarity of the instructions to appellant's jury, and appellee's failure to challenge that interpretation in any prior state proceeding, this case presents no occasion for deviating from that elemental rule.[6]

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[6] *Amicus* defends the rationality of § 10855 on the grounds that it is not a presumption at all since there is a perfect "identity" between the predicate fact—willful retention of the car—and the ultimate fact—intent to embezzle. The argument is incorrect on its face. There is, of course, a big difference between deliberately keeping a car beyond the due date and specifically intending a fraudulent conversion. Moreover, even if there were an "identity" between willful retention and intent, the argument is unavailing since the predicate facts set out in § 10855 generate a presumption with respect to *every* element of the offense.

III. THE CONCEDED VIOLATION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Assuming, without conceding, that the acknowledged constitutional violation is even subject to harmless-error analysis, appellant does not oppose the State's request that the issue be remanded to the court below.[7] Given the current unavailability of the trial transcript, however, we continue to believe that the considerations of economy that ordinarily commend a remand on harmless-error issues are absent in this case.[8] Although the Court exercises its power to conduct a harmless-error inquiry only "sparingly," the unique circumstances of this case warrant an exception to that general rule. *Rose* v. *Clark*, 478 U.S. 570, 584 (1986).

If the Court does elect to address the issue, the conclusion that the acknowledged error was "harmful" is all

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[7] Appellee contends that *Rose* v. *Clark* definitively determined that any instruction containing an impermissible presumption is subject to harmless-error analysis. By its terms, *Rose* only dealt with mandatory *rebuttable* presumptions and, as we explain in our opening brief, its reasoning extends no further. Moreover, appellee's contention proves too much. Surely, for example, an instruction that directed the jury to presume guilt from the return of the indictment could never be found harmless. Although less extreme, the presumptions at issue in this case are no less conclusive and, therefore, warrant the same analysis. *See* Opening Br. at 35-38.

[8] The State now apparently takes the position that: (1) there is at least some possibility that the trial transcript would be recovered and; (2) it might have some bearing on the outcome of the harmless-error question. Br. at 35 & 35 n.34. The suggestion is quite remarkable in light of the State's prior position on these issues in response to appellant's longstanding efforts to obtain the transcript. We acknowledge, however, that the possibility of the recovery of the transcript, however remote, argues in favor of remand. We assume that by the time of argument, appellee will be able to inform the Court more fully of the status of the transcript.

but inescapable on this record. As the last-minute inquiry from the jury confirms, the State's proof that appellant had specifically intended to deprive the owner of *permanent* possession was highly equivocal. Given that the evidence on that crucial element was anything but "dispositive" and given the substantial indications that the jury was able to reach its verdict only by relying on the impermissible presumptions, appellee cannot begin to carry its burden of proving that the error was harmless beyond a reasonable doubt. *See* Opening Br. at 35-41.

To the extent the State addresses these issues at all, its response is wholly unpersuasive. As we understand it, appellee's only contention is that, contrary to the trial court's understanding of California law, the jury could have found appellant guilty of grand theft even without proof of an intent to deprive the owner of permanent possession. In short, like its position on the merits, appellee's harmless-error analysis is premised on the view that the lower courts' construction of state law was incorrect and is now subject to challenge in this Court. As we explain in detail above, that suggestion is untenable in the circumstances of this case. For purposes of this Court's review, the law of California is the law that was presented, without objection, to appellant's jury and sustained on appeal by the Appellate Department. Against that controlling legal framework, appellee does not, and cannot, contend that the error was harmless.

Moreover, even if it were somehow open to appellee to suggest that the lower courts misapplied state law, the result would be the same. Harmless-error analysis requires the reviewing court to determine whether, even excluding the impact of the violation, it can conclude beyond a reasonable doubt that the "verdict would have been the same." *Pope* v. *Illinois*, 481 U.S. 497, 503 n.6

(1987). That inquiry necessarily requires a careful weighing of the record-evidence to determine the degree to which it supports the jury's verdict on the crime actually charged. It does not, however, authorize the reviewing court to find the defendant guilty of another offense, even if it concludes that the evidence would support such a verdict. Surely, a court, having found an error in a murder instruction, could not hold that the defendant was in any event guilty of assault. For precisely the same reason, the State's suggestion that appellant was guilty of a lesser crime than that set out in the trial court's charge is entirely beside the point. Appellant's jury was explicitly and repeatedly instructed that grand theft requires a specific intent to deprive the owner of permanent possession, and, as evidenced by its query, its verdict clearly reflected that definition of the crime.[9] The only pertinent question, therefore, is whether—independent of the impermissible presumptions—*that* verdict is so overwhelmingly supported by the evidence that "no rational jury" could fail to reach it. *Rose* v. *Clark*, *supra*, 478 U.S. at 580-81. Because that question can only be answered in the negative, the judgment below should be reversed.

[9] We note in this regard that appellant was acquitted of the charge under Vehicle Code § 10851—a statute that *does* authorize conviction even if the defendant intended only a temporary deprivation.

CONCLUSION

For the foregoing reasons, the judgment of the Appellate Department of the Superior Court of California, County of Los Angeles should be reversed.

Respectfully submitted,

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No. 87-6997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE J. CARELLA,

Appellant,

v.

STATE OF CALIFORNIA,

Appellee.

On Appeal from the Appellate Department
of the Superior Court of California,
County of Los Angeles

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE AMERICAN RENTAL ASSOCIATION IN SUPPORT OF APPELLEE

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MOTION OF THE AMERICAN RENTAL ASSOCIATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The American Rental Association ("ARA"), a not-for-profit, membership, national trade association located at 1900 19th Street, Moline, Illinois 61265, hereby respectfully moves for leave to file the attached brief as *amicus curiae*. The consent of the attorney for the appellee, State of California, has been obtained. Appellant, Eugene J. Carella, has not given his consent.

ARA is comprised of approximately 3,600 independent equipment rental businesses throughout the

United States engaged in the business of short-term rentals of an extremely wide variety of equipment and other personal property to the public. The highly diversified lines of equipment include: homeowner items, party supplies and equipment, construction machinery and equipment, vehicles and other mobile equipment (rarely automobiles), durable medical equipment and devices, and exercise and recreational equipment.

ARA's interest in this case arises from the fact that it represents the entire equipment/personal property rental industry. ARA believes that the brief which it is requesting permission to file will afford the Court a broader perspective in defining the constitutionality of statutory inferences and presumptions in criminal theft cases and determining the proper balance between the individual rights of the accused and the property rights of the rental business owner.

The personal property/equipment rental industry, has experienced a strong, steady growth in rental outlets and business volume during the last three decades. ARA estimates that there are at least 15,000 rental outlets (non-automobile) in the United States with annual revenues exceeding $16 billion.[1] Independent equipment rental businesses emerged in the United States immediately following World War II in

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[1] Based on "Audit Report for the 12 Month Period Ending December 1988 for *Rental Equipment Register*," an independent monthly industry magazine, prepared by Business Publications Audit of Circulation, Dec. 31, 1988, 360 Park Ave. S., New York, N.Y. 10010; and the "*Cost of Doing Business Survey-1987*," an independent study prepared by Brown, Bortz and Coddington, 155 S. Madison St., Denver, Colo. 80209, Copyright 1988 American Rental Association.

response to the "do-it-yourself" movement. Many persons entered the business through the building or mechanical trades, drawing upon their experience in the maintenance and repair of power tools, machines and other equipment. The majority of rental stores and "yards" began as the "Mom and Pop" variety, where husband and wife work side-by-side in the business. Today after the second, and even third generations, rental business firms have matured into strong, efficient small business organizations.

Short-term equipment rentals have met growing customer acceptance because of the practical convenience of renting as opposed to owning, especially in connection with more expensive equipment. Renting avoids unnecessary investment, solves repair and maintenance problems, eliminates storage difficulties and is the perfect answer to obsolescence.

The success of the equipment rental industry reflects the *independent* function of the equipment rental firms in the American marketplace.

Along with the rapid growth of short-term equipment rentals, the industry has experienced ever-increasing losses, caused by the "conversion" of rental equipment by dishonest customers. The courts have defined conversion as the unauthorized or wrongful exercise of dominion and control over another's personal property, to the exclusion of, or inconsistent with, the rights of the owner.[2]

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[2] *Catania v. Garage De Le Paix, Inc.*, 542 S.W. 2d 239, 241 (Tex. Civ. App. 1976).

The problem of conversion is unique when compared to other types of theft, in that the property is obtained lawfully, through a bailment transaction evidenced by a rental agreement. By paying a modest deposit or fee, the customer lawfully obtains possession of the property, in contrast to the more common situation where a thief acquires possession through unlawful means in the nature of a trespass. Dishonest customers are seldom deterred from converting rental property because of the ease with which the offense may be committed and the ease of avoiding criminal prosecution or conviction under generic theft laws. This, we submit, is contrary to sound public policy.

ARA supports state statutes and judge-made law which establish guidelines by which juries may distinguish criminal conversion from innocent or negligent failure to return property. Hence, ARA is deeply interested in the use and evolution of statutory inferences and presumptions to establish bench marks, and to insure that they do not infringe upon the constitutional rights of the accused. Our interest is not to relieve the prosecution of *any* burden of proof of *any* element of the offense. On the contrary, we remain dedicated to the preservation of the due process rights of every member of the public. They are the industry's highly valued customers and comprise the very foundation of the rental business.

Many state legislatures have recognized the problem and adopted statutes of various form intended to mitigate the proliferation of the crime. They and their judicial counterparts, will continue to look to the pronouncements of this high Court for guidance in their efforts to achieve the necessary and delicate balancing of the respective rights.

These crucial considerations have prompted ARA's interest in, and desire to contribute to, the Court's deliberations in this case.

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April 3, 1989

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BRIEF OF *AMICUS CURIAE* THE AMERICAN RENTAL ASSOCIATION IN THE SUPPORT OF APPELLEE

INTEREST OF THE *AMICUS CURIAE*

The interest of *amicus* is set out in the foregoing motion.

STATEMENT OF THE CASE

In the interest of judicial economy, *amicus* adopts by reference the statement of case set forth by appellee.

STATEMENT OF FACTS

On March 25, 1985 Eugene John Carella rented a car from MPG Car Rental (hereinafter "MPG"), located in Beverly Hills, California.[1] The rental agreement was for a 30 day term. The agreement, was introduced into evidence at trial[2] and provided: "RENTER AGREES VEHICLE SHALL BE RETURNED WITHIN 72 HOURS OF DUE DATE OR LEGAL ACTION MAY BE TAKEN." On March 26, 1985, appellant exchanged the car for another and agreed to return the car on April 26, 1985. Subsequently, appellant extended, by telephone, the rental agreement until May 3, 1985. Appellant did not return the car on May 3, 1985.

The owner of MPG, Galil Yaacov, telephoned appellant numerous times after May 3. He even went to the location listed on appellant's business but was never able to contact appellant. It was discovered that appellant did not live at the address listed as his residence in the rental agreement. Appellant actually resided at the business address which he listed on the rental agreement.

Appellant never returned any of the phone messages by Mr. Yaacov. Mr. Yaacov sent a registered letter to both addresses listed by appellant on the

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[1] This Statement is based upon the "Settled Statement" with which Appellant takes issue. The portion of the Settled Statement upon which we rely is found in the Joint Appendix (hereinafter "JA") at 36 - 39. While our Statement has been edited, it is largely based on, and in many places, a verbatim version of the Settled Statement. *Amicus* accepts the regularity of the Settled Statement.

[2] The agreement was not included in the Joint Appendix, but is in the record.

rental agreement. The letter, dated May 16, 1985, demanded the immediate return of the car and was introduced at trial:[3]

> Please return the car you rented from us on MAR. 26, 85 *IMMEDIATELY* to our office at 9047 Wilshire Blvd. or legal actin [sic] will be taken against you as this car will be reported to police as stolen.

The letter addressed to the appellant's residence as shown on the rental agreement was returned by the post office with the notation "Moved, not forwardable." The other letter sent to the appellant's stated business address was not returned to the post office. In the absence of any denial of receipt by appellant, it is reasonable to conclude that he received it.

Mr. Yaacov made continued attempts to reach appellant by the telephone at the business number appellant gave on the rental agreement, leaving a number of messages. Later, this was found to be the telephone number of a hotel. None of the calls were returned by appellant. Mr. Yaacov asked the hotel clerk, who had been taking the messages, if appellant had received the messages that he was leaving. The clerk replied that appellant had received the messages.

On June 3, 1985, Mr. Yaacov reported the theft of the rented car to the Beverly Hills Police Department. Police Detective Schwab attempted to contact the appellant, leaving messages which also were not returned. An arrest warrant was obtained, and on June

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[3] The letter was not included in the Joint Appendix, but is in the record.

27, 1985, appellant was arrested and the car was recovered in the parking lot adjoining appellant's stated business address.[4]

Two witnesses testified for the defense. Appellant's fiancee testified that at the time of the events of this case, she was living with appellant at the address he listed on the rental application as the business address. She testified that she did not remember receiving any messages to return the rented car, although she normally left the "message gathering" duties to appellant.

She testified that she remembered going to a gas station, accompanied by appellant on a Saturday, May 11, 1985, to fill up the rented car with gas, and that it was in the evening hours and close to the MPG rental office. She knew that appellant had a large amount of cash on him at the time, but did not know what he was going to do with the money. She stated that she normally rode the bus and not in appellant's rented car. She knew nothing of the rental agreement.

The second witness to testify for the defense was Jennifer Avres who was employed as a cadet at the Beverly Hills Police Department. She stated that as a part of her duties, she would occasionally answer the telephone. She said that she worked on June 3,

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[4] The car had an excessive amount of mileage on it from the date rented. The brakes were worn down so low that they needed replacement. The car also had minor dents around the body. At no time did appellant ever contact MPG rental office after he extended the return of the car rented May 3, 1985. Appellant never paid for the use of the car other than the initial $400 deposit.

1985, and that she had no memory of whether or not appellant telephoned Detective Schwab.

Appellant introduced no further evidence and offered no explanation of his failure to return the car. He was convicted by the jury of grand theft auto.[5]

SUMMARY OF ARGUMENT

The establishment and use of statutory inferences and presumptions which are permissive in nature do not deny the accused the right of due process under the United States Constitution, Fourteenth Amendment, Section 1. Such statutorily-based inferences are constitutionally sound and should be upheld, so long as the requisite rational relationship between the basic facts and the ultimate facts can be found.

The Court has concluded that a permissive inference is constitutionally unsound only if there is no rational way the trier of facts could make the connection permitted by the inference, a different standard than that used in connection with a mandatory

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[5] While appellant was charged only with a single theft offense, Cal. Penal Code § 487, namely, grand theft auto, along with a motor vehicle code offense, Cal. Vehicle Code § 10851, Vehicle Taking, instructions were given on various theft theories, the elements of which are extremely inconsistent, especially on the intent elements. The jury was instructed on grand theft auto (JA 6), theft by trick and device (JA 11), and theft by embezzlement (JA 12). Grand theft auto and theft by trick require an intent to deprive the owner of property permanently. Embezzlement does not require an intent to deprive permanently. Second, the first two theft offenses appear to require that the intent to deprive be formed at the time of the taking, and not later, unlike embezzlement. But Cal. Vehicle Code § 10855 expressly applies only to embezzlement and Cal. Penal Code § 484(b) applies only to "theft by fraud."

presumption. Thus, any constitutional analysis must begin with a determination of the nature of the presumption.

Two statutes, Cal. Penal Code Section 484(b) and Cal. Vehicle Code Section 10855, gave rise to the jury instructions. Under California law, statutory presumptions are always permissive in nature. The California Supreme Court transformed all presumptions into permissive presumptions in order to preserve their constitutionality, thereby directing California trial courts to instruct such statutory presumptions as permissible inferences. Therefore, if the instructions on the presumptions at issue were given in mandatory form, rather than as permissive inferences, the constitutional defect lies with the instructions, not with the statutory presumptions themselves.

One may easily make the rational connection required to uphold the constitutionality of the statutes giving rise to the instructions at issue here. In connection with Vehicle Code Section 10855, the finding of wilful and intentional conduct is itself, and without more, the elemental or ultimate fact needed to satisfy the government's burden of proof as to intent under the embezzlement theft statute. Since the basic fact is a finding of the full measure of intent needed to prove the crime, it is a logical identity with the elemental fact and, therefore, rational beyond all question. One may certainly infer an unlawful intent to retain property from its unexplained and extended retention in the face of a written demand to return personal property to its rightful owner. As for Penal Code Section 484(b), it is certainly more likely than not that a person, who fails to return property in the face of a written demand for its return and the pas-

sage of a reasonable period of twenty days, has formed an intent to deprive the owner of his property.

Neither the statutes nor the instructions involved at the trial shifted any burden of persuasion to the appellant. Rather, and at most, they shifted only a burden of production, namely the burden of producing some explanation or other evidence tending to explain his failure to return the vehicle to its owner in the face of the written notice warning and the passing of extended periods of time.

Because of the low burden of production imposed by judicially-made California law, the "presumptions" should be analyzed as permissive inferences, and not as mandatory in nature. Under California law, instructions on presumptions such as those involved here *are not to be given* if the defendant produces any evidence responsive to and tending to dispel the presumption. If one presumes that the trial judge in the case at bar followed the law, it follows that the subject instructions were given because of the failure of the appellant to produce any such evidence.

The test for what constitutes a conclusive or irrebuttable presumption includes more than just the language of the instructions on their face. A conclusive presumption removes the presumed element from the case once the State has proven the predicate facts giving rise to the presumption. The issue of intent was not removed from this case by virtue of the jury instructions. First, the jury was required to find special predicate acts apart from the *actus reus* in order to trigger the "presumptions." Second, the jury was instructed that ignorance or an honest and reasonable mistake of fact would render the appellant's acts to be "lawful." Once the instruction is read in light of

the other instructions given, it is clear that the jury was being given a choice.

Amicus submits that when read as a whole, these instructions gave the jury a full and complete understanding of the allocation of burden. The burden of proof beyond a reasonable doubt of each and every element of the offense remained with the prosecution. *In re Winship*, 397 U.S. 358 (1970). This is all the Constitution requires.

ARGUMENT

I. THE PRESUMPTIONS IN THE TWO CALIFORNIA STATUTES ARE PERMISSIBLE INFERENCES, AND THERE IS A RATIONAL CONNECTION BETWEEN THEIR BASIC FACTS AND THE ULTIMATE FACTS PRESUMED.

Amicus submits that the establishment and use of statutory and judge-made inferences and presumptions which are permissive in nature do not deny the accused the right of due process, given the requisite relationship between the basic facts and the ultimate facts. Such inferences and presumptions found in State law do not merely manifest a rational connection between the basic, evidentiary or predicate facts and the elemental or presumed fact. The basic, evidentiary facts, at least most often, are alone capable of supporting a jury conviction beyond a reasonable doubt. Statutorily-based inferences such as those at issue are constitutionally sound and should be upheld. In fact, they should be encouraged as devices which establish standards by which criminal culpability might be predicted by courts, juries, and the public.

The case most central to analysis here is *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). In *Ulster*, the Court analyzed an oft-examined form of presumption that the presence of a gun in a car constitutes "presumptive evidence of its illegal possession by all persons then occupying the vehicle." *Id.* at 142, n.1. The Court noted that the "value" of inferences and presumptions vary from case to case depending upon the "strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently." *Id.* at 156. In assessing the various types of inferences and presumptions, the Court concluded that a permissive inference[6] is constitutionally unsound only if there is "no rational way the trier could make the connection permitted by the inference." *Id.* at 157. The Court set a more rigorous test for mandatory presumptions. Thus, any constitutional analysis must begin with a determination of the nature of the presumption.

A. The California Supreme Court Has Judicially Transformed All Presumptions Arising Under The Criminal Statutes Of The State To Permissive Inferences And Thereby Preserved The Constitutionality Of The Statutory Presumptions Under Attack.

Both the prosecution in presenting its case, and the trial judge in instructing the jury, relied on two statutory presumptions. One is found in Cal. Vehicle

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[6] A "permissive inference" allows, but does not require, the trier of facts to infer the elemental fact from the basic fact, and imposes no burden upon the defendant. *Ulster*, 442 U.S. at 156-7.

Code Section 10855, which deals specifically with vehicles, and declares:

> Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

The other is found in Cal. Penal Code Section 484(b), which deals with all rental property in general, and reads:

> Except as provided in Section 10855 of the Vehicle Code, intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

Under California law, presumptions such as the above are *always* permissive in nature. In *People v. Roder*, 33 Cal.3d 491, 189 Cal.Rptr. 501 (1983), a case involving a statutory presumption relating to a presumption of guilty knowledge of a second hand property dealer under prosecution for receiving stolen property, the California Supreme Court expressly considered the effect of *Ulster* and *Sandstrom v. Montana*, 442 U.S. 510 (1979) in evaluating the statutory presumption. The court concluded that the presumption would be mandatory given this Court's decisions in *Ulster* and *Sandstrom* and the State's own Evi-

dence Code. However, in order to preserve the constitutionality of that presumption and similar presumptions such as the two here, the court held that existing California criminal statutory presumptions should be "pare[d] down . . . to constitutionally permissible limits, rather than to abrogate them altogether." *Roder*, 658 P.2d at 1312. Thus, the court, by law, "transformed" the statutory, rebuttable presumptions[7] into permissible inferences, thereby directing California trial courts to instruct such statutory presumptions as permissible inferences. The court reasoned:

> First, preservation of the statutory provisions in a restrained form will still enable the court to inform the jury of an inference which the Legislature—drawing on its general experience—has concluded can often reasonably be drawn from proof of the basic facts (cf. *United States v. Gainey*, *supra*, 380 U.S. 63, 67, 85 S.Ct. 754, 757, 13 L.Ed.2d 658); elimination of the device would deprive the jury of any legislative guidance in circumstances in which direct evidence of actual guilty knowledge will rarely be available. (See generally ALI, Model Pen.Code, § 223.6, coms. 1, 4(d), pp. 232, 241-245.) Second, even as a permissive inference, the statutory provision will serve an important substantive function in regulating the conduct of secondhand dealers, inducing such dealers to make reasonable inquiry when they are offered

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[7] Prior to the decision in *Roder*, statutory presumptions such as § 10855 of the California Vehicle Code were considered to be mandatory, but not conclusive, presumptions.

> property that may be stolen. (Blakely & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform* (1976) 74 Mich.L.Rev. 1511, 1572-1589.) The state has a strong interest in encouraging dealers to conduct their business in this fashion in order to make it more difficult for thieves to dispose of their wares, and it appears appropriate to interpret section 496 to preserve this interest insofar as is constitutionally permissible.

Roder, 658 P. 2d at 1313.

Roder is a clear-cut departure from *Sandstrom*. In *Sandstrom*, the Court avoided the contention that the instruction involved was a permissive inference or even if mandatory, that it shifted only the burden of production and not the burden of persuasion. *Id.* at 515-516. Key elements in the Court's determination were the instruction's mandatory language and the Montana rules of evidence dictating that a presumption could be overcome only by the preponderance of evidence contrary to the presumption.

The operative standard under the law of the State of California has been the reverse of that of the State of Montana since the California Supreme Court's decision in *Roder* in 1983. Therefore, if the instructions on the presumptions at issue were given in mandatory form, rather than as permissive inferences, the constitutional defect lies with the instructions, not with the statutory presumptions themselves when read in light of *Roder*.

B. There Is A Rational Connection Between The Basic Or Evidentiary Facts And The Elemental Or Ultimate Facts, As Required By *Ulster* And The Elemental Facts Are More Likely Than Not To Flow From The Basic Facts.

We turn to examine the rational connection between the basic or evidentiary facts and the ultimate or elemental facts, as required by *Ulster*.[5] One may easily make the rational connection for permissive inferences in this case. In short, the elemental facts in both of the presumptions in question are "more likely than not" to flow from the basic facts. *Id* at 165, quoting *Leary*, 395 U.S. at 46.

The presumption in Cal. Penal Code Section 484(b)[6] provides guidance to a jury as to when they should draw an inference. The prosecution is required to prove the predicate facts, namely, a written demand and a further twenty day delay, in order to gain the benefit of the presumption, or more accurately, in-

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[5] One analytical difficulty arises at this point. It is our position that the statutes giving rise to the presumptions here suffer from no constitutional infirmity because of *Roder*. Therefore, the only issues remaining relate to the instructions, as given, not the statutes. However, in *Ulster*, the Court held that the analysis of the rational basis of the inference involved should be based on the "more likely than not" test found in *Leary v. U.S.*, 395 U.S. 6, 46 (1969), and the facts of the case before the Court, rather than on a facial basis. Since the instructions given may have departed from *Roder*, we will undertake the analysis of the rational basis of the inference at issue for the purpose of determining the statute's constitutionality on the basis of the statute and the evidence, rather than by reference to the instructions.

[6] Also given as "PEOPLE'S SPECIAL INSTRUCTION # 1—Presumption Respecting Theft by Fraud." JA 15.

ference as to the ultimate or elemental fact of intent. It must be recognized that a jury is free to draw an inference regarding the intent of appellant from a written demand and the passage of a reasonable period of time under the general jury instruction concerning circumstantial evidence. Such an inference would clearly have been reasonable here. For instance, if the jury believed that appellant had received the May 16, 1985 letter, which demanded "immediate" return of the vehicle, they would have been free to conclude that Mr. Carella had formed the requisite intent to defraud or embezzle immediately following that date when he did not return the vehicle.

A similar analysis may be applied in connection with the presumption contained in Cal. Vehicle Code Section 10855.[10] That section provides as follows:

> Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

Despite the use of the word, this may not even be a presumption at all because of its absolute dependence on wilfulness and intention. In order to trigger the "presumption" the jury must find, as a predicate fact, that appellant's failure to return the leased vehicle was *wilful and intentional*.[11] The finding of wilful and

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[10] "PEOPLE'S SPECIAL INSTRUCTION # 2—Presumption Respecting Embezzlement of a Leased or Rented Vehicle." JA 15.

[11] In *People v. Cloward*, 196 Cal. App. 2d 669, 16 Cal. Rptr.

intentional conduct is itself, without more, the elemental or ultimate fact needed to satisfy the govern-

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772 (Cal. Ct. App. 1961), the court discussed Section 10855 of the Motor Vehicle Code:

> The presumption declared by section 10855 is not conclusive. It is prima facie and is rebuttable. A statute may validly declare a prima facie presumption to be the legal effect of the proof of certain facts. However, the due process clause of the Fourteenth Amendment requires that there be a rational connection between the facts proved and the fact presumed. (*People v. Wells*, 33 Cal. 2d 330, 346 [202 P. 2d 53].)
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> Under section 10855 the facts to be proved are that a person has leased or rented a vehicle and that he has *willfully and intentionally* failed to return the vehicle to the owner within five days *after the lease or rental agreement has expired*. "Willfully" means done with a purpose or willingness to commit the act. (Pen. Code, § 7, subd. 1.) "Intentionally" means done with intention of purpose, intended, designed. (*People v. McCree*, 128 Cal. App. 2d 196, 202 [275 P. 2d 95].) Mere proof of negligent failure to return the vehicle would not raise the presumption. We think it manifest there is a rational connection between the facts proved and the fact presumed. (See cases collected, 15 West's Cal. Dig., Crim. Law, Section 307.) The presumption is based on past experience and reasonable probabilities.
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> * * *
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> A presumption is defined as a 'deduction which the law expressly directs to be made from particular facts.' (Code Civ.Proc., Section 1959.) Thus, a presumption is based on a fact or facts and not upon mere surmise or conjecture—and certainly the facts giving rise to the presumption were here shown to exist. Presumptions are legislative determinations of reasonable probabilities. What experience has shown has normally happened in the past, under the same conditions will normally happen again. Simply because a criminal instead of a civil case is involved does not require

ment's burden of proof as to intent under the embezzlement theft statute. This presumption is thus distinguished from those found in *Sandstrom* and *Francis v. Franklin*, 471 U.S. 307 (1985).[12] Since the predicate act and the ultimate or elemental fact are a single identity under the law, the presumption in this case, based upon Vehicle Code Section 10855, was redundant as to the element of intent. Here, the presumption is triggered by an actual finding that the defendant "wilfully and intentionally failed to return the vehicle" and the passage of five days.[13] Since the basic fact is a finding of the full reason of intent needed to prove the crime, it is a logical identity with the elemental fact and, therefore, rational beyond all question.[14]

In connection with the presumption under Penal Code Section 484(b), the rational connection between the basic fact needed to trigger the presumption,

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> the jury to disregard, in their reasoning, the reasonable probabilities that the Legislature has determined exist from certain facts . . . .

Cloward, 196 Cal. App. 2d at 672 - 673.

[12] Indeed, under California law the specific intent to prove embezzlement does not require proof of an intent to *permanently* deprive the owner of possession of a leased vehicle. Rather, the state must prove only that the person fraudulently appropriated or converted the vehicle to his own use, i.e., he wilfully and intentionally failed to return the vehicle, in other words, intended not to return it.

[13] The passage of five (5) days, in addition to a finding of the requisite intent, is more than would otherwise be required.

[14] The crime of embezzlement is unlike theft, in that intent at the outset of possession is unnecessary and trespass is not an element.

namely, the demand letter and the twenty day period, and the elemental fact of intent to commit theft, is similarly strong. Certainly one may reasonably infer an unlawful intent to retain property from its unexplained and extended retention in the face of a written demand to return personal property to its rightful owner.

Mr. Carella rented a car and failed to return it after an extended due date of May 3, 1985, and further after twenty days from the demand letters of May 16, 1985, until June 27, 1985 when the automobile was finally recovered by the police.

Had no jury instructions regarding statutory presumptions been given, there was ample evidence in the record for the jury to convict appellant of embezzlement beyond a reasonable doubt. Any inference needed to establish the level of intent required for conviction under California law could have readily been drawn. It follows that the legislature has concluded that it is "more likely than not" that a person who fails to return personal property after the agreed due date and after a demand letter plus twenty days, intends to convert the property to his own use.

Given the standard instruction to the jury concerning direct and circumstantial evidence, the "deduction of fact"[15]—that Mr. Carella "fraudulently appropriated or converted [the car] to his own use or purpose"[16]—was "logically and reasonably . . .

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[15] "COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS." JA 18-19.

[16] "THEFT BY EMBEZZLEMENT—DEFINED." JA 12.

drawn"[17] in light of his unexplained failure to return the rented car and in the face of specific written demand and warning.

II. WHILE THE JURY INSTRUCTIONS MAY HAVE SHIFTED THE BURDEN OF PRODUCTION TO APPELLANT, NO BURDEN OF PERSUASION WAS SHIFTED, AND SINCE A MINIMAL PRODUCTION BY APPELLANT WOULD HAVE DISSIPATED THE PRESUMPTIONS, THE COURT SHOULD TREAT THEM AS PERMISSIBLE INFERENCES DESPITE THEIR LANGUAGE.

Neither the statutes nor the instructions involved at the trial shifted any burden of persuasion to the defendant. Rather, and at most, they shifted only a burden of production, namely, the burden of producing some explanation or other evidence tending to explain his failure to return the vehicle to its owner in the face of the written demand and warning, and the passing of an extended period of time. Even a low level showing in this regard would have dissipated the presumptions and no instruction on them would have been required, appropriate, or, we can reasonably conclude, given by the court. Furthermore, when the instruction was given, it was counterbalanced by another jury instruction concerning innocent conduct:

> An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime.
>
> Thus a person is not guilty of a crime if he commits an act or omits to act under an

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[17] "COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS." JA 18-19.

> honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful.[18]

Merely a minimal burden of production, and no burden of persuasion, was ever shifted to the defendant. Appellant was a practicing lawyer and a member of the Bar of this high Court.[19] He chose not to afford the court and the jury even the slightest explanation or other evidence as to his refusal to return the car to its rightful owner, which would have dissipated the statutory "presumptions" and thereby eliminated any instructions on them to the jury.

A. The Presumptions, As Given In The Instructions, Were Not Mandatory In Nature.

The nature of mandatory presumptions was explained in *Ulster*, where the Court stated that mandatory presumptions tell the trier of the fact "that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *Ulster*, 442 U.S. at 157. However, the Court noted that:

> To the extent that a presumption imposes an extremely low burden of production—e.g., being satisfied by "any" evidence—it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such. See generally

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[18] "IGNORANCE OR MISTAKE OF FACT." JA 9.

[19] *Who's Who in American Law*. JA 52. *See*, 5th Ed. 1987-88 at 119.

Mullaney v. Wilbur, 421 U.S. 684, 703 n. 31, 95 S.Ct. 1881, 1892 n. 31, 44 L.Ed.2d 508.

> In deciding what type of inference or presumption is involved in a case, the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it.

Id. 442 U.S. at 157, n.16. This question was expressly avoided by the Court in *Francis*.[20] Because of the low burden of production imposed by judicially made California law necessary to negate *in toto* the "presumptions," they should, in fact, be analyzed as permissive inferences, and not mandatory in nature.

B. Under California Law, The Instruction On The Statutory Presumptions Could Be Given Only Because There Was No Evidence Introduced Which Tended To Controvert Them.

Amicus submits that California law concerning instructions on presumptions is crucial to the analysis. Under California law, instructions on criminal statutory presumptions *are not to be given* if the defendant produces any evidence responsive to, and tending to dispel the presumption.[21] In *People v. Hedrick*, 105

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[20] "We are not required to decide in this case whether a mandatory presumption that shifts only a burden of production to the defendant is consistent with the Due Process Clause, and we express no opinion on that question." *Francis*, 471 U.S. at 314, n.3.

[21] It appears that in some states an instruction on a presumption may be given once sufficient evidence has been introduced into the record to support a finding of the predicate acts of the presumption and without regard to whether the defense

Cal. App. 3d 166, 164 Cal. Rptr. 169 (Cal. Ct. App. 1980), a case involving Penal Code Section 484(b), the court ruled:

> The presumption should have disappeared from the case when the defendant testified regarding his understanding of the return date for the car and the jury should not have been instructed on the presumption.

Hedrick, 105 Cal. App. 3d at 171. Again, in *People v. Hemmer*, 19 Cal. App. 3d 1052, 97 Cal. Rptr. 516 (Cal. Ct. App. 1971) the court had ruled similarly:

> With evidence sufficient to support a finding of the lack of intent to commit theft by fraud, the presumption disappeared from the case, and an instruction as to its effect should not have been given.* The legislative committee comment on Evidence Code Section 604, describing the effect of a presumption affecting the burden of producing evidence, notes: "Such a presumption is merely a preliminary assumption in the absence of contrary evi-

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produces or has produced any evidence in response and may, even itself, be considered as evidence. 29 Am. Jur. 2d *Evidence* § 166 (1967). In the State of California, an instruction on a presumption which shifts the burden of production is given only if the defense produces no evidence in response to the predicate acts evidence and presumptions attaching thereto. The presumption and resulting instruction impose no burden of persuasion and do not adversely impact or derogate the presumption of innocence. Such instructions are much more closely allied conceptually with jury instructions commonly given where the law recognizes and imposes a duty to produce on a particular party because that party is best able to cause production and does not. They are often given on inferences arising from missing witness, possession of recently stolen property, and flight.

dence, i.e., evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If contrary evidence is introduced, the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict . . . ."

"If a presumption affecting the burden of producing evidence is relied on, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears and the judge need say nothing about it in his instructions . . . ."

Thus, if there is evidence sufficient to support a finding of the nonexistence of the presumed fact, the presumption disappears and no instruction should be given. (See CALJIC (3d ed.) Appendix B.)

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* "The unique feature of a Thayer presumption is that it has no further function; once the opponent satisfies the burden of producing evidence, the presumption vanishes and the action proceeds as if the presumption never existed." (Note, *The California Evidence Code, Presumptions*, 53 Cal.L.Rev. (1965) 1439; see Thayer, Preliminary Treatise on Evidence (1898) pp. 313-352.)

Hemmer, 19 Cal. App. 3d at 1061.

If one presumes that the trial judge in the case at bar followed the law, it follows that the subject in-

structions were given because of the failure of the defendant to produce any such evidence. In effect, Mr. Carella, a practicing attorney and member of this Court, either sat on his rights or had no explanation or responsive evidence.[22] It was for that reason, and that alone, that the instructions could be given. Under these circumstances, and especially in light of the minimal threshold level of production needed to dissipate the presumption, *amicus* submits that this Court should treat and analyze the presumptions the same as permissible inferences or bench marks against which the jury was to gauge their inference-drawing.

III. THE JURY WAS NOT INSTRUCTED TO A CONVICTION THROUGH THE USE OF A CONCLUSIVE PRESUMPTION WHICH WOULD HAVE REMOVED AN ELEMENT OF THE CRIME FROM CONSIDERATION AND WOULD HAVE ENABLED THE PROSECUTION TO OVERCOME ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT.

The jury in this case was never instructed as to the meaning of the words, "presumption" or "presume." The common definitions of "presume" found in authoritative dictionaries make no reference to the legal mandate which lawyers, legal scholars and judges sometimes attach to the word "presume."

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[22] We note that under California law, an intent to return property at some future time is *not* a defense to an embezzlement-based theft charge. See Cal. Penal Code § 512. This is also apparent from the fact that an intent to deprive the rightful owner of possession *permanently* is *not* an element of embezzlement. Compare JA 6 and JA 12. Thus, the instructions for grand theft auto and embezzlement were internally inconsistent, and may well have led to the jury's confusion and note. While the jury asked about the "legal requirement of permanent deprivation of possession," permanent deprivation was not even required to prove embezzlement.

The Court in *Sandstrom* reviewed the dictionary meaning of the word "presume" and found it to mean "to suppose to be true without proof." 442 U.S. at 517. To "suppose," according to Webster's Ninth New Collegiate Dictionary (1985) at 1186 is "to lay down tentatively as a hypothesis, assumption or proposal." *Amicus* suggests that to impute to the mind of a "reasonable juror," such a mandated legal conclusion from a mere reading of the word, "presumed" in a criminal statute would be to blink at reality.

One need only read the extensive and erudite definitions and discussions of the meaning of presumptions in *Ulster*, *Sandstrom* and *Francis*, from an untutored perspective, to understand this fallacy.

A. The Jury Instructions Did Not Remove The Issue Of Intent From The Case.

Neither did the jury instructions create a conclusive presumption which infringed upon the paramount presumption of innocence of the defendant. The test for what constitutes a conclusive or irrebuttable presumption includes more than just the language of the instructions on their face. In *Ulster*, the Court distinguished mandatory presumptions from permissive inferences on the basis of merely the language. Further, in *Francis*, the Court stated:

> A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted.

Francis, 471 U.S. at 314, n.2.

But the issue of the intent was not removed from this case by virtue of the instructions, *in toto*, given to the jury. On the contrary, the jury was instructed:

> IGNORANCE OR MISTAKE OF FACT
>
> An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime.
>
> Thus a person is not guilty of a crime if he commits an act or omits to act under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful.

JA 9.

It does not follow that the instructions were conclusive of the issue of intent and removed it from the case, when the jury was expressly told that appellant was "not guilty" if he acted under an honest and reasonable belief.

Even assuming *arguendo* that the Court were to conclude that the language of the jury instructions here was as conclusive as the language examined in *Sandstrom*, we submit the that a critical difference exists between this case and *Sandstrom* which compels a different result. In *Sandstrom* and the two cases upon which it based its analysis, *Morrissette v. United States*, 342 U.S. 246 (1952) and *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), the presumptions involved enabled the prosecution to prove the *mens rea* element of the offense solely by virtue of the presumption alone and proof of the mere *actus reus*. In other words, in those cases, once the

prosecution proved the non-intent elements of the criminal act itself, the instructions enabled the jury to *presume* criminal intent in a logical leap that required no other evidence at all. In *Sandstrom*, the jury was able to presume from the act of killing, alone, that the defendant acted "deliberately." In *Morrissette*, the jury was able to presume "wilful and knowing" intent from the trespass constituting the taking of government property. In *U S. Gypsum*, the jury had been permitted to presume an intent to fix prices from the effect of an exchange of pricing information. In each of these cases, the government was relieved of the burden of proving beyond a reasonable doubt intent, the mental element of the offense. The jury was effectively "directed to find against defendant on the element of intent." *Winship*, 397 U.S. at 364. Since the State was not forced to prove intent beyond a reasonable doubt, "the defendant was deprived of his constitutional rights as explicated in *Winship*." *Sandstrom*, 442 U.S. at 523.

The presumptions involved in the case at bar are readily distinguishable. First, the jury was required to find specific predicate acts in addition to the *actus reus* in order to trigger the conditional "presumptions." Under the Penal Code Section 484(b), the jury was required to find (1) a written demand and (2) the passage of twenty days without return of the rental car in order to activate the presumption. Second, the jury was instructed that ignorance or an honest and reasonable mistake of fact would render the defendants acts to be "lawful." This is almost the converse of the instruction given in *Sandstrom*. Here, the jury was effectively told that it should acquit ap-

pellant if the jury found that appellant's conduct flowed from his reasonable mistake or ignorance.

B. The Jury Instructions As A Whole Cure Any Constitutional Error Found In The Instructions On The Statutory Presumptions.

The jury was told: "[t]he instructions are to be considered as a whole and each individual instruction is to be considered in the light of all the others."[23] When viewed as a whole, the instructions to the jury were not the equivalent of a directed verdict or legal conclusion. *Francis*, 471 U.S. at 318 - 325. It is abundantly clear that the jury was given a choice. As the Court held, "[t]he jury, of course, did not hear only the two challenged sentences." *Francis*, 471 U.S. at 318. On the contrary, *amicus* submits that the instructions, when taken as a whole, "explained the proper allocation of burden with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion." *Id.* at 319.

The jury here was told of the elements of the offense, and that it was the State's burden to prove guilt beyond a reasonable doubt. JA 21. While the jury was instructed as to the presumptions, it was only because there was no evidence in the record tending to rebut the presumptions. Finally, the trial court instructed the jury concerning the effect of ignorance, innocent conduct and mistake of fact. JA 9. In other words, the instructions on the presumptions predicated on the two California statutes were not given in a vacuum or without a counterbalancing of instructions. Indeed, when read as a whole, the in-

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[23] JA 18.

structions informed the jury in very real and meaningful terms of the impact of contravening evidence. The burden of proof of each element of the offense beyond a reasonable doubt remained with the prosecution. The prosecution carried that burden of proof beyond a reasonable doubt by establishing, without more, the predicate or basic facts. *In re Winship*, 397 U.S. at 364. This is all the Constitution requires.[24]

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[24] Even if constitutional error were found, it does not follow, contrary to an implication in *Sandstrom*, that the error cannot be harmless. In *Rose v. Clark*, 478 U.S. 570 (1986), the Court expressly considered this question, and held that a *Sandstrom* error can be found harmless under *Chapman v. State of California*, 386 U.S. 18 (1967). The Court held that:

> As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S., at ___, 106 S.Ct., at 1436; *United States v. Hasting, supra*, at 508-509, 103 S.Ct., at 1980.
>
> * * *
>
> We therefore find that the error at issue here—an instruction that impermissibly shifted the burden of proof on malice—is not "so basic to a fair trial" that it can never be harmless. Cf. *Chapman*, 386 U.S., at 23, 87 S.Ct., at 828.
>
> The purpose behind the rule of *Sandstrom v. Montana* supports this conclusion. *Sandstrom* was a logical extension of the Court's holding in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), that the prosecution must prove "every fact necessary to constitute the crime with which [the defendant] is charged" beyond a reasonable doubt. *Id.*, at 364, 90 S.Ct., at 1073; see *Sandstrom*, 442 U.S., at 520, 523, 99 S.Ct., at 2457, 2458; *Francis v. Franklin*, 471 U.S., at ___, 105 S.Ct. at ___. The purpose of that rule is to ensure that only the guilty are criminally punished. As the Court stated last term in *Francis v. Franklin*, the rule "protects the 'fundamental value determination of our so-

CONCLUSION

For the foregoing reasons, the decision of the Appellate Department of the Superior Court of California, County of Los Angeles should be affirmed.

Respectfully submitted,

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ciety,' given voice in Justice Harlan's concurrence in *Winship*, that 'it is far worse to convict an innocent man than to let a guilty one go free.' " *Ibid.*, quoting *Winship, supra*, at 372, 90 S.Ct., at 1077 (Harlan, J., concurring). When the verdict of guilty reached in a case in which *Sandstrom* error was committed is correct beyond a reasonable doubt, reversal of the conviction does nothing to promote the interest that the rule serves.

Rose, 478 U.S. at 578 - 580.